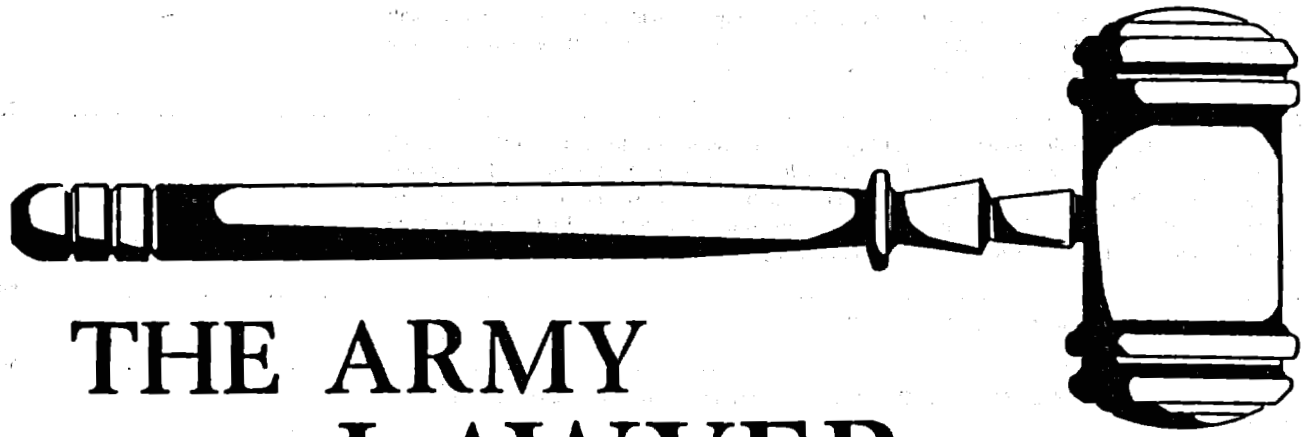
LEGAL ASSISTANCE



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Editor
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DEPARTMENT OF THE ARMY
OFFICE OF THE JUDGE ADVOCATE GENERAL
WASHINGTON, DC 20310-2200

REPLY TO
ATTENTION OF

DAJA-CL (27) 9 February 1990

MEMORANDUM FOR ALL STAFF AND COMMAND JUDGE ADVOCATES AND SUPERVISORY JUDGE ADVOCATES

SUBJECT: Unlawful Command Influence -- Policy Memorandum 90-1

1. Unlawful command influence constitutes a serious threat to the fair and impartial administration of military justice. Not only does it detract from the public perception of fairness, it also undermines good order, discipline, morale, and unit cohesiveness. We must be ever vigilant to prevent, detect, and remedy actions which may create even the appearance of improper or unlawful command influence.

2. Although usually well-intended, articles and speeches by commanders, noncommissioned officers and other leaders are easily misperceived by an audience. Comments about crime, crime prevention, individual responsibility, and general discipline may create the impression that the writer or speaker is establishing a policy or expects a predetermined disposition of offenses. Practical experience shows that the risks of a perception of unlawful command influence may outweigh any possible benefit from the article or speech.

3. Command and staff judge advocates and others must ensure that officers, noncommissioned officers and other leaders are sensitive to the many means by which unlawful perceptions can be created. They must be cautioned that seeking the advice and assistance of legal advisors is a prerequisite to publishing or expressing command views or policies that may impact upon the administration of miltiary justice. Public affairs officials should clear all articles or announcements relating to crime or discipline with their legal advisors. Command policies should be expressed only in writing.

4. Personal and independent discretion is a cornerstone of our military justice system. We cannot permit unlawful command influence or perceptions thereof to erode either the public's or the soldier's faith in the fairness of the military justice system.

5. I expect every individual involved in the administration of the military justice system to adhere to this policy and to all policies concerning the fair and impartial management of our system.

William K. Suter

WILLIAM K. SUTER
Major General, USA
Acting The Judge Advocate General

Reserve Callup Authorities: Time for Recall?

Captain L. Dow Davis, USNR[1]

Introduction

This article examines the proper legal authorities for the callup of National Guard and Reserve personnel for training, mobilization exercises, operational missions, national emergencies, natural disasters, and other civil domestic emergencies. It will examine whether existing legal provisions for the callup of Reserve personnel are adequate in light of the present missions of the Reserve components or whether those provisions need revision. The article does not examine the emergency statutes on industrial surge, defense production, and other related topics that have been dealt with extensively elsewhere.[2]

Recently, the Department of Defense has convened a joint study group to review and make recommendations on the operation, effectiveness, and soundness of the Total Force Policy; the assignment of missions to the Active and Reserve components of the Armed Forces; and the force structure of the Active and Reserve components. The report is due in interim form on September 15, 1990, and in final form on December 31, 1990, pursuant to section 1101 of the National Defense Authorization Act for FY 1990 and 1991.[3] It presents an excellent opportunity to apprise Congress of the shortcomings of the present Reserve system. Several of these deficiencies are listed in the appendix to this article.

Summary

The advent and implementation of the "Total Force Policy," under which the Reserve components receive equipment compatible with the active duty forces and assume a greater share of defense responsibilities, has expanded the use of the Reserve components in a number of different circumstances. Guard and Reserve personnel have been called up or used in diverse situations ranging from mobilization exercises[4] to the Korean War in the 1950s,[5] the Berlin crisis in 1961-62,[6] the Cuban crisis in 1962,[7] the *Pueblo* incident in 1968,[8] the Vietnam buildup in 1968-69,[9] the Arab-Israeli October War in 1973,[10] the Grenada operation in 1983,[11] operations off Lebanon in 1986,[12] the Libyan operation in 1987,[13] fleet operations in the Persian Gulf,[14] out-of-CONUS training duty in Central America,[15] and in Panama in Operation "Just Cause."

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[1] Captain L. Dow Davis IV, USNR, is a Selected Reservist who has done tours as a Mobilization Planner in the Office of the Secretary of the Navy, in the Office of the Secretary of Defense, and most recently, in the Office of the Chief of Naval Operations (OP-06).

[2] An excellent resource is R. Danzig, A Review of the Adequacy of Principal Statutory Authorities Affecting DOD Surge and Mobilization Capacity (1983) (unpublished manuscript).

[3] Pub. L. No. 101-189, 103 Stat. 1352 (1989).

[4] The modern DOD crisis management organization came about as a result of shortcomings identified in Joint Chiefs of Staff (JCS) Exercise NIFTY NUGGET in 1978 and Exercise PROUD SPIRIT 1980. National Security Directive 47 created policy for implementation of national crisis and mobilization preparedness, and established the DOD Emergency Preparedness Board. *See* Dep't of Defense Directive 3020.36, Assignment of Emergency Preparedness Responsibilities to Department of Defense Components (Nov. 2, 1988).

[5] During the Korean War, President Truman declared a national emergency in Proclamation 2914, 1950 U.S. Code Cong. & Admin. News 1557. The Secretary of Defense and Service Secretaries were authorized to call up Reserve personnel for up to 24 months. *See* Executive Order 10,271, 1951 U.S. Code Cong. & Admin. News 1066.

[6] Armed Forces-Ready Reserve Act, Pub. L. No. 87-117, 75 Stat. 242 (1961), authorized President Kennedy to extend enlistments and to order units and up to 250,000 individual members of the Ready Reserve to active duty for not more than 12 months. 1961 U.S. Code Cong. & Admin. News 283-84. 8,020 reservists were called to activate 49 ships and 18 aircraft squadrons. Naval Reservist News, March 1988, at 2.

[7] Naval Reservist News, March 1988, at 2.

[8] 851 reservists were called up following the capture of the *Pueblo* under the authority of the Russell Amendment to the Defense Appropriations Act of 1967, which expired by its own terms on June 30, 1968. Pub. L. No. 89-687, 80 Stat. 980 (1966); Naval Reservist News, March 1988, at 2.

[9] Approximately 37,000 personnel were called up for Vietnam under the Russell Amendment (Pub. L. No. 89-687, 80 Stat. 980 (1966), 1976 U.S. Code Cong. & Admin. News 1036), including 994 Seabees, 14 Air National Guard fighter and reconnaissance wings and groups, 8 Air Force Reserve MAC airlift wings and groups, and 6 Naval Reserve fighter and attack squadrons. *See* Exec. Orders 11,392, 1968 U.S. Code Cong. & Admin. News 4685 & 11,406, 1968 U.S. Code Cong. & Admin. News 4698. Congress had declared a "national exigency" in the Gulf of Tonkin Resolution. *See* Southeast Asia Peace & Security Act, Pub. L. No. 88-408, 78 Stat. 384 (1964).

[10] The Air Guard, Navy, and Air Force Reserve furnished extensive volunteer airlift capacity in the 1973 Mid-East War. 1976 U.S. Code Cong. & Admin. News 1034, 1037.

[11] *See, e.g.*, Perpich v. United States Dept. of Defense, 666 F. Supp. 1319, 1321 (D. Minn. 1987), *rev'd and remanded*, 57 U.S.L.W. 2345 (8th Cir., Dec. 6, 1988), *vacated*, 880 F.2d 11 (8th Cir. 1989) (*en banc*), *cert. granted*, 58 U.S.L.W. 3427 (Jan. 8, 1990).

[12] *See, e.g., id.*

[13] The first *Perpich* panel, before being reversed *en banc*, noted somewhat skeptically that the tankers for the Libyan raid were on duty under the training provisions of 10 U.S.C. § 672(d) (1982). *Id.*, slip op., n.41, 1988 U.S. App. LEXIS 16494 (8th Cir. Dec. 6, 1988).

[14] Naval Reservist News, June 1988, at 4-5; Naval Reservist News, August 1988, at 3.

[15] *Id.*; *Perpich*, 666 F. Supp. at 1321.

Recently, the Department of Defense (DOD) and the Reserve components have been tasked with drug interdiction missions under the National Defense Authorization Act for Fiscal Year 1989.[16]

The fact that there are fourteen different legal authorities for the callup of reservists[17] and eight different terms to describe the duty authorized has often caused confusion as to which provisions should be used to implement the numerous disparate missions under the Total Force Policy. Because of the confusion raised by the many variations of "active duty," "active duty for training," and other terms used throughout Title 10, there are numerous questions about the proper interpretation and use of these provisions. As former Secretary James Webb noted in congressional testimony, there is a "compression of missions" under the Total Force Policy, such that it is difficult to draw meaningful distinctions between training and operations. As he pointed out, there is a quantum leap in seriousness between training duty under 10 U.S.C. § 672 and a Presidential callup under 10 U.S.C. § 673b.[18]

The War Department's 1947 admonition that "[m]any of these laws are archaic and have been amended so many times that extensive legal research is often required to settle even a relatively minor question of statutory interpretation"[19] may hold true today for some of the callup provisions of the U.S. Code. Recent events have shown a need for a low-key, flexible callup method for preidentified critical units. The Navy's Persian Gulf operations, for example, resulted in a requirement for additional minesweeping personnel. Such individualized and flexible involuntary callups are difficult and politically unpalatable under present policy and law.

Despite the growth of the Reserves in end strength, equipment, and readiness, and the calls for increased participation, particularly from the Navy Reserve,[20] there has not been a corresponding marked increase in the use of the Reserves in crisis situations. There has not been an involuntary callup of the Reserves in almost twenty years, largely because of the low-intensity nature of recent crisis operations and the political backlash from Vietnam. Instead, the Armed Forces have relied mostly on reservist volunteers and active duty training periods to reinforce the Active component in times of crisis.[21] Moreover, there has never been a Presidential callup of the Reserves for operational missions under 10 U.S.C. § 673b (the "200K" provision) in the thirteen years of its existence.

Recently, the focus has been on low-intensity conflicts, those situations where there is a limited political-military confrontation to achieve political, social, or economic objectives, as opposed to the more intense and larger threats such as Vietnam or Korea that might require involuntary callup of up to 200,000 reservists. To cover these low-intensity conflicts (which may be protracted in nature) in times of decreasing defense budgets, the Department of Defense and the Armed Services should concentrate on developing a low-key, cost-effective flexible mobilization capability for the 1990's and beyond. This capability could be developed through legislation or by having the President delegate authority[22] to the Secretary of Defense or to the service secretaries to permit the callup of a limited number of pre-identified critical units for operational missions under the 200,000 person Presidential callup authority of 10 U.S.C. § 673b. As will be explained more thoroughly below, by the limited use of the section 673b callup authority, we could depoliticize the callup of relatively small numbers of reservists for important missions and establish precedent for the use of this authority during a period of relative tranquility. Once the limited callups become accepted and commonplace, DOD would have a workable manpower augmentation vehicle that could take into account changing world conditions in an "ambiguous warning" situation, i.e., in those situations where the exact intentions of a potential adversary cannot be accurately assessed, but where additional contingency planning and extra-personnel ("ramp up") are prudent. This power to call up Reserve personnel would be flexible enough to accommodate the degree of danger or risk inherent in everything from low- to high-intensity conflicts. In fact, it could be exercised in a graduated method in direct response to varying defense conditions and serve as a deterrent to aggression by signaling our national will.

Since Joint Chiefs of Staff Exercise NIFTY NUGGET in 1978, there have been numerous studies and recommen-

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[16]Pub. L. No. 100-456, 102 Stat. 1918, § 1105 (1988).

[17]Naval Reservist News, March 1988, at 2.

[18]*Perpich*, 57 U.S.L.W. 2345, slip op. at 100 n.40; unpub. testimony of James Webb on *Federal Authority Over National Guard Training Before the Sen. Subcomm. on Manpower & Personnel*, 99th Cong., 2d Sess. (1986).

[19]*See* 1956 U.S. Code Cong. & Admin. News 4613, 4614.

[20]*See* Address by RADM Smith, Naval Reserve Association Annual Convention (Oct. 1, 88); J. Avella, "Don't Ask, Order ... ," Naval Institute Proceedings (Feb. 1988); SECNAV National Navy Reserve Policy Board, Recommendation 4-87, SECNAV Note 5420 (May 9,1988); Naval Reserve Assn. Resolution 1-88.

[21]Dukakis v. U.S. Dept. of Defense, 686 F. Supp. 30, 35 (D. Mass. 1988), *aff'd*, 859 F.2d 1066 (1st Cir. 1989), *cert. denied sub nom* Massachusetts v. Dept. of Defense, 109 S. Ct. 1743 (1989); *Perpich*, 666 F. Supp. at 1323.

[22]Delegation of callup authority to DOD would be pursuant to 3 U.S.C. § 301 (1982).

dations concerning Reserve and industrial mobilization.[23] While these studies have not identified any total "war stoppers," they have indicated a need for reform. Consequently, it is recommended that a multi-service team be convened under the auspices of the Department of Defense[24] to write a legislative proposal to be sent to Congress to alleviate the concerns voiced in these studies. A list of recommendations on subject areas that should be reviewed to increase personnel mobilization readiness is included at the end of this article as an appendix.

Basic Mobilization Principles

The legal authorities for callup of reservists are contained in Title 10 and Title 32 of the United States Code. Title 10 provides the authority for calling up the Reserves and the Guard when it is in federal service.[25] Title 32 covers the Guard when it is in state service.[26] Provisions concerning the training of reservists are contained in the Reserve components chapter of Title 10 (10 U.S.C. §§ 264-281). Provisions concerning the militia are contained in 10 U.S.C. §§ 311-312. Active duty personnel provisions for reservists are contained in 10 U.S.C. §§ 671-689.

These mobilization provisions are a compendium of prior legislation, such as the National Defense Act of 1916,[27] the Naval Reserve Acts of 1925 and 1938,[28] the National Defense Act of 1948,[29] the Armed Forces Reserve Act of 1952[30] (which unified the separate laws pertaining to reservists of the individual services, particularly the Navy), the Defense Act of 1956[31] (which codified Title 10 and created Title 32), the National Defense Authorization Act for Fiscal Year (FY) 87,[32] and the Goldwater-Nichols DOD Reorganization Act of 1986.[33] In general, these acts relied upon and codified historical military experience, the significance and origin of which may have been lost or changed since the provisions were enacted. Moreover, the applicability of legislative history from the 1950's may be doubtful in light of Congress's enhanced reliance on the Guard and Reserve to perform missions under today's Total Force Policy. Consequently, some of the provisions in Titles 10 and 32 are not a model of clarity and may need to be revised.

Generally, the laws set up the sequence under which Reserve component personnel[34] will be called. For instance, of the total Reserve resources (i.e., the Ready Reserve, the Standby Reserve, and the Retired Reserve) the most recently trained troops in the Ready Reserve are usually called up first, preferably as units.[35] The Ready Reserve is called before both the Standby Reserve[36] and the Retired Reserve[37] in order to keep from involuntarily subjecting veterans to combat again.[38] The United States Code provides that inactive and retired personnel will not be called up unless there are not enough qualified active reservists in the Ready Reserve. It also provides for a "stop loss" authority to keep personnel from leaving the service during a national emergency.[39] Once called, reservists are eligible for protection under the Soldiers' and Sailors' Civil Relief Act[40] and for reemployment under the

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[23] *E.g.*, R. Danzig, *supra* note 2; Navy Inspector General Report, *Wartime Mobilization and Planning Process Review* (June 16, 1987 draft).

[24] Section 201(6) of Executive Order No. 12,656, "Assignment of Emergency Preparedness Responsibilities" provides: "The head of each Federal department and agency, as appropriate, shall identify areas where additional legal authorities may be needed and ... take appropriate measures toward acquiring those authorities." Exec. Order No. 12,656, 53 Fed. Reg. 47,491 (Nov. 23, 1988).

[25] *See, e.g.*, 10 U.S.C. §§ 3495-3501 (1982).

[26] *See* 32 U.S.C. § 502 (1976).

[27] Ch. 134, 39 Stat. 166 (1916).

[28] 34 U.S.C.A. § 855 (1938).

[29] Ch. 149, 62 Stat. 87 (1948).

[30] Pub. L. No. 82-476, 66 Stat. 481 (1952).

[31] Act of Aug. 10, 1956, Pub. L. No. 1028, 70A Stat. 1 (1956).

[32] Pub. L. No. 99-661, 100 Stat. 3816 (1986).

[33] Pub. L. No. 99-433, 100 Stat. 992 (1986).

[34] The Reserve components consist of the Army National Guard, the Army Reserve, the Navy Reserve, the Marine Corps Reserve, the Air National Guard, the Air Force Reserve, and the Coast Guard Reserve. 10 U.S.C. § 261 (1982).

[35] DOD Dir. 1235.10, Ordering the Selected Reserve to Active Duty for Operational Missions (1989 draft). *See also Perpich*, slip op. at 32, 1988 U.S. App. LEXIS 16494.

[36] The Standby Reserve consists of a pool of personnel, such as key civilian employees, who maintain their military affiliation without being in the Ready Reserve. 10 U.S.C. § 273 (1982). They are managed in accordance with DOD Dir 1235.9, Management and Mobilization of the Standby Reserve (July 8, 1986).

[37] 10 U.S.C. § 274 (1982).

[38] 1952 U.S. Code Cong. & Admin. News 2005, 2008; 10 U.S.C. § 673(c) (1982).

[39] 10 U.S.C. §§ 511(a), 671b, 673c (1982).

[40] 50 U.S.C. app. §§ 501-591 (1982).

Veterans' Reemployment Rights Act.[41] The Department of Defense also maintains standby legislation for Congress to authorize the Selective Service System to begin conscription in time of national emergency.[42]

By statute[43] and under DOD Directives,[44] the services are required to maintain data on National Guard and Reserve personnel,[45] including their physical condition, qualifications, and other information affecting their availability for service. In order to maintain this data, they use the Reserve Components Common Personnel Data System (RCCPDS).[46] Planning for wartime manpower mobilization is accomplished by the Wartime Manpower Planning System (WARMAPS).[47]

The legislative authority for these callups—the United States Code—uses a confusing number of different terms to describe the type of duty for the recalled service member. For instance, the Code uses the terms "active duty," "inactive duty training," "active duty training," "full time training duty," "active duty (other than training)," "active duty other than for training," "annual training duty" (ATD), and "active duty for training" (ACDUTRA). While the legislation is explained and implemented by a number of DOD and service regulations (which are constantly being updated to keep pace with the times),[48] there seems to be no standard scheme for the use of these terms in regard to the type of duty they authorize. This alone may be justification enough to revamp the laws.

Provisions for Training of Reservists

Ready Reserve Training

The Reserve component training provisions, contained in Chapter 11 of Title 10, are among the laws that may need revision to allow more flexibility. Section 270(a) sets forth the standardized training required for each Ready Reservist (a Ready Reservist is defined as a member of the Selected Reserve,[49] the Individual Ready Reserve (IRR), or the Inactive National Guard).[50] Each year, unless specified otherwise by the Secretary of Defense, Ready Reservists (less some Individual Mobilization Augmentees (IMAs))[51] are required to participate in at least forty-eight scheduled drills or training periods.[52] These drills are rather inappropriately called "inactive duty training" (IDT or drills),[53] as though the reservist were some sort of inanimate object. Such classification is probably to distinguish weekend type drills from active duty under orders.[54] Ready Reservists must also serve on "active duty for training" for not less than fourteen days and not more than thirty days during each year. Reserve personnel who do not satisfactorily perform this training duty can be ordered to involuntarily perform additional ACDUTRA for not more than forty-five days a year.[55]

Recently, there have been innovations in IDT or reservist drilling in the IMA program. While the IMA program varies widely from service to service, these innovations generally have allowed reservists with flexible schedules to drill with their gaining commands during normal working hours and also in crisis situations. Among the new ideas is the concept of "noncontinuous orders," which allows drilling reservists to divide their ACDUTRA and perform it on a day-by-day basis according to the needs of the reservist's gaining command, rather than in one continuous two-week stint. The programs have generated much enthusiasm and have been thought to be a cost-effective way of implementing the Total Force Policy.[56]

War or Overseas Duty

Another training provision that applies to reservist and active duty personnel alike came about when unseasoned troops were sent abroad in time of war. Members of the

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[41] 38 U.S.C. § 2021 (1982). *See, e.g.*, Gulf States Paper Corp. v. Ingram, 811 F.2d 1464 (11th Cir. 1987); *but cf.* Eidukonis v. Southeastern Pa. Transp. Auth., 873 F.2d 688 (3d Cir. 1989). For more information on reservists rights, contact the National Committee for Employer Support of the Guard and Reserve, toll free at 1-800-336-4590, or the U.S. Department of Labor's Veterans' Employment and Training Service at (202) 523-8611.

[42] A pre-drafted DOD Emergency Action Package (hereinafter, "EAP") would repeal the prohibition on conscription contained in section 17(c) of the Military Selective Service Act, 50 U.S.C. app. § 467(c) (1976).

[43] 10 U.S.C. § 275 (1982); Exec. Order No. 12,656, 1988 U.S. Code Cong. & Admin. News B43, B49-52.

[44] *E.g.*, DOD Directives cover wartime manpower planning (DOD Dirs 1100.18, 1100.19), Reserve categories (1200.15), training and retirement categories (1215.6), initial training (1215.9), screening the Ready Reserve (1200.7 and 1215.6), mobilization (1235.9, 1235.10), retirees (1352.1), and disaster and civil emergencies (3025.1, 3025.12). A number of recommendations to improve these regulations were made in the Navy Inspector General's Report, *Wartime Mobilization and Planning Process Review* (June 16, 1987 draft).

[45] DOD Dir 1205.17, Official National Guard and Reserve Component Data (June 20, 1985).

[46] DOD Dir 7730.54, Reserve Components Common Personnel Data System ("RCCPDS") (May 13, 1988).

[47] DOD Dir 1100.18, Wartime Manpower Mobilization Planning ("WARMAPS") (Jan. 31, 1986); DOD Dir 1100.19, "WARMAPS Policies and Procedures" (Feb. 20, 1986).

[48] *See supra* note 44.

[49] The Selected Reserve consists of Selected Reserve Units and Individual Mobilization Augmentees (IMAs). DOD Dir. 1235.10, Mobilization of the Ready Reserve (Oct. 24, 1986).

[50] 10 U.S.C. §§ 268, 269 (1982).

[51] IDT for IMAs of various services may vary between zero and forty-eight IDT drills.

[52] 10 U.S.C. § 270 (1982).

[53] The Navy uses the term "IDTT," Individual Duty Travel Training for its "WET" (weekend away training) of reservists.

[54] Inactive duty training is defined as "duty under Section 206 of Title 37 or any other provision of law and special additional duties within the units to which they are assigned." DOD Dir 1235.10, Ordering the Selected Reserve to Active Duty for Operational Missions (1989 draft).

[55] 10 U.S.C. § 270(b) (1982); DOD Dir 1215.13, Unsatisfactory Performance of Ready Reserve Obligation (June 30, 1979).

[56] An example is the Joint Service Mobilization Unit in OSD Reserve Affairs' Mobilization Policy and Plans Division, which helps man the OSD Crisis Coordination Center in times of emergency.

Armed Forces, including Reserve component personnel, who are sent overseas are required to have completed basic training and, in time of war or national emergency, a minimum of twelve weeks of basic training or its equivalent.[57]

Involuntary Fifteen-Day Training Duty

10 U.S.C. § 672(b) provides that, at any time, an authority designated by the appropriate Service Secretary may involuntarily order to active duty any unit of the Reserve component (Reserve or Guard) that is in an "active status," (i.e., not in the inactive or retired Reserve or Guard)[58] and any member not assigned to a unit organized to serve as a unit, for "not more than 15 days a year."[59] While the law does not, on its face, directly require that this duty be related to training, the legislative history implies that this section is to be used for training and therefore may prohibit the use of the two-week active duty for training provision as a "ramp up" vehicle in advance of the 200k callup, although such interpretation is not without controversy.[60] As a practical matter, however, the two-week ACDUTRA requirements are interpreted broadly and used for both training and operational mission requirements, although some have viewed this with suspicion. For instance, in one case involving the power of state Governors,[61] the court in dicta incorrectly opined that the use of the 10 U.S.C. § 672 training provisions in situations like the Libyan raid or Grenada was surreptitious and a way of avoiding the requirements of 10 U.S.C. §§ 673, 673(a), and 673(b), which require a declaration of emergency or consultation with Congress.[62] Of course, the court was wrong as to the 10 U.S.C. § 673(b) (200k provision), because this provision for augmentation of operational missions does not require declaration of a national emergency, nor consultation with Congress, unless the congressional notification requirement of 10 U.S.C. § 673b(f) is deemed "consultation." For guard personnel, duty under this provision requires consent of the appropriate state Governor, subject to Montgomery Amendment limits and case law described below.[63]

Voluntary Callup of the Reserve Component

10 U.S.C. § 672(d) provides that a representative of the Secretary concerned may, with the consent of the member, order a member of the Reserve component, including the Guard,[64] to "active duty" for more than the fifteen days specified in the training provision in section 672(b). National Guard callup under this section requires consent of the Governor or state authority concerned. National Guard personnel use this provision for out-of-CONUS duty in Central America and on tours of active duty. Section 672(d) and the fifteen-day ACDUTRA provisions of 10 U.S.C. § 672(b) have furnished most of the reservists for duty during the last twenty years.

Voluntary Drug Interdiction Duty

Following an onslaught of drug importation into the United States, Congress passed the Anti-Drug Abuse Act of 1988.[65] In the National Defense Authorization Act for Fiscal Year 1989,[66] Congress assigned the Department of Defense responsibility as the lead agency of the Federal Government for the detection and monitoring of aerial and maritime transit of illegal drugs into the United States. The Act also authorized the Secretary of Defense $40 million to approve and fund state Governors' plans for expanded use of the National Guard in support of drug enforcement activities while in state status under Title 32.[67] On January 6, 1989, the Deputy Secretary of Defense appointed the Chairman of the Joint Chiefs of Staff to be responsible for detection planning and monitoring of the DOD drug mission. The Assistant Secretary of Defense (FM&P) was given responsibility for approving and recommending funding for use of the National Guard in drug enforcement activities while in state status under Title 32.[68] The Assistant Secretary of Defense for Reserve Affairs is the DOD drug coordinator.

The states submitted drug operations support plans to the National Guard Bureau.[69] The National Guard was authorized to support drug interdiction operations,

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[57] 10 U.S.C. § 671 (1982); DOD Dir 1215.9, Initial Active Duty Training in Reserve Components (July 2, 1976).

[58] 10 U.S.C. § 101(25) (1982) defines "active status."

[59] The "active status" requirement would seem to exclude the Inactive Standby and Retired Reserve. 10 U.S.C. § 101(25) (1982); DOD Dir 1235.9, Management and Mobilization of the Standby Reserve (July 8, 1986).

[60] For instance, in 1985 considerable controversy arose as to whether section 672(b) could be used as a crisis ramp up provision to bring additional reservists on board in advance of the 200K callup. Given the legislative history indicating that section should not be used for training, this may not be legal. 1976 U.S. Code Cong. & Admin. News 1034, 1039.

[61] *Perpich*, 57 U.S.L.W. slip op. at 50-51.

[62] *Perpich*, 57 U.S.L.W. slip op. at 50.

[63] *See Dukakis*, 686 F. Supp. 30; *Perpich*, 666 F. Supp. 1319.

[64] 10 U.S.C. §§ 261, 269(b) (1982).

[65] Pub. L. No. 100-690, 102 Stat. 4818 (1988).

[66] Pub. L. No. 100-456, 102 Stat. 1919 (1988).

[67] *Id.*, § 1105, 102 Stat. 2047.

[68] Memorandum of Deputy Secretary of Defense, W. H. Taft (Jan. 6, 1989).

[69] Memorandum of Lt. Gen. Herbert R. Temple, Support to Drug Enforcement Operations (Oct. 14, 1988).

provided the support did not adversely affect training and readiness of Guard personnel to perform their wartime mission.[70] Even though National Guard personnel in Title 32 status are governed by state law and therefore not subject to posse comitatus restrictions, they were not authorized to become involved in the seizure or arrest of individuals involved in illegal drug activities and were forbidden to process or handle illegal drugs seized during an operation.[71] Guard personnel were authorized to support civil authorities either during AT, IDT, and UTA periods, or under the voluntary or involuntary training provisions of 32 U.S.C. § 502.[72]

National Guard Training

The training requirements of section 270(a) of Title 10 do not apply to the National Guard, even though the Guard is, by definition, usually a part of the Ready Reserve. This is because section 270(a) specifically excludes Guard personnel from section 269(b), the provision that puts the Army and Air National Guard in the Ready Reserve of the Army and Air Force respectively. This explains the seemingly redundant and similar provision for National Guard training set forth in 32 U.S.C. § 502.

It would not be legal for the United States Government to call up Guard personnel under section 270; Guard personnel are specifically excluded from the terms of section 270, and the training requirements for the Guard are set forth separately in 32 U.S.C. § 502(a) at forty-eight drills and "at least 15 days" of training (reservists perform "not less than 14 days" under section 270).[73] Instead, in actual practice, the Guard is called for its comparable training duty requirements under Title 32, section 502.

As noted above, Guard personnel serving on operational or out-of-CONUS missions use the voluntary active duty provisions of 10 U.S.C. § 672(d) for duty in excess of fifteen days. The use of this provision invokes the status of forces provisions and guarantees other collateral federal benefits,[74] which are especially important if the person is injured, wounded, or captured.

Involuntary Callup of Reservists for Operational Missions

Selected Reserve Augment of Operational Missions (the 200K Provision)

Prior to 1976, Reserve units could only be activated during a national emergency or a war. The only exception to this were the Russell Amendment provisions, which were used in the 1968-69 Vietnam callup.[75] In 1976, however, Congress enacted 10 U.S.C. § 673b to provide the President with the authority to authorize the Secretary of Defense and the Secretary of Transportation (for the Coast Guard)[76] to involuntarily order (at that time, up to 50,000) members of the Selected Reserve to "active duty (other than for training)" for not more than ninety days. This "50k provision" was designed to augment the active forces for any operational mission.[77]

In the interest of national security, the President could extend this operational mission callup ninety days, provided Congress was notified of the reasons for the extension. There is no requirement that state Governors approve the callup of the Guard under this provision. The House Report on the 50K callup provision indicates that Reserve forces activated under this authority should not be used for training or to provide assistance during a domestic disturbance such as an insurrection or natural disaster.[78] The natural disaster prohibition provision was later codified in 10 U.S.C. § 673b(b).

The 50K callup authority was amended and expanded to 100,000 persons (100K) in 1980, largely as a result of experience in JCS Exercise NIFTY NUGGET 78.[79] It was later enlarged to 200K in the National Defense Authorization Act for FY 87, mostly because of a provision offered by Senator Denton and others.[80] This constant upgrade of the number of persons who can be called up reflects the intent of Congress to place increased reliance on use of the Reserve components under the Total Force Policy. Again, the legislative history of what was then the 100K provision

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[70] *Id.*

[71] *Id.*

[72] *Id.*; "A member of the National Guard may ... be ordered to perform training or other duty in addition to [drills and 15 days' training]." 32 U.S.C. § 502(f) (1976).

[73] 10 U.S.C. § 270(a) (1982).

[74] Wiener, *The Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 210-211 (1940).

[75] Pub. L. No. 89-687, 80 Stat. 980 (1966); 1966 U.S. Code Cong. & Admin. News 1161.

[76] Under 14 U.S.C. § 3, upon declaration of war or when the President directs, the Coast Guard shall operate and be integrated as a service in the Navy. *See also* 32 C.F.R. § 700.501 (1988).

[77] 1976 U.S. Code Cong. & Admin. News 1034, 1039.

[78] *Id.*

[79] Armed Forces Reserve Act Amendments of 1980, Pub. L. No. 96-584; 1980 U.S. Code Cong. & Admin. News 7007, 7008-7010; *see supra* note 4.

[80] National Defense Authorization Act of 1987, Pub. L. No. 99-661, 100 Stat. 3816 (1986 U.S. Code Cong. & Admin. News 6413-6638).

expresses a preference for calling up even small groups of people as "units." Congress envisioned that the Presidential callup for operational mission provision would be used in minor crisis situations or as authority to pre-position forces during a period of international tension before a major confrontation or the declaration of a national emergency.[81] The 200K active duty can be terminated by order of the President or by law.[82]

The legislative history of the operational mission provision of section 673b indirectly gives meaning to the involuntary fifteen-day active duty provision of section 672(b). In enacting section 673b—authorizing the President to order 200,000 personnel to "active duty (other than for training)"—Congress indicated that adequate authority is currently provided the Secretaries of the services to order reservists to "active duty" for up to fifteen days to perform "training" under section 672(b). Thus, Congress apparently intended that section 673b be used primarily for the hard core mission of augmenting the active force for operational missions and not for training or disaster assistance.[83]

Congress thought an essential element in this provision was the authority to use reservists to augment specific operational missions, without the need to declare a national emergency—an action that might be considered provocative in the international arena or politically risky on the domestic front. Although a national emergency had been declared for the Depression by President Roosevelt in 1933,[84] the Korean War by President Truman in 1950,[85] the postal strike by President Nixon in 1970,[86] and the balance of payments and other international economic problems by President Nixon again in 1971,[87] there was no formal declaration of an emergency for military operations during the Vietnam War.[88] Ironically, perhaps because of the same type of political fallout which would be occasioned by the declaration of a national emergency,[89] the 200K Presidential callup provision has not been used once in its thirteen year existence, notwithstanding the fact that Congress has consistently increased the limits of this callup authority.

It appears that the 200K callup provision of section 673b has not been used during a low-intensity conflict because it still may be too sensitive politically. For instance, during the Persian Gulf crisis and convoying operations, there was no authorization to call up the Navy Reserve minesweepers, which comprised some eighty-two percent of the Total Force. Instead, the Navy used volunteer reservists.[90] Even though a 200K callup does not by itself invoke the War Powers Act,[91] many felt that this was not a good time to exercise a controversial Presidential callup. One view is that the callup of even a small part of the 200K force could have given out the "wrong signals," in part because it had never before been used. This experience underscores the need for a low-key, flexible mobilization response authority that can be used in even sensitive political times.

There does appear to be a nonlegislative solution to this conundrum—10 U.S.C. § 673b(a). In the absence of legislative reform,[92] the President, during a time of relative tranquility, could use the delegation language of 10 U.S.C. § 673b(a) to authorize the Secretary of Defense to call up a limited number of reservists with pre-identified critical skills. This could be done by executive order,[93] in much the same way that the President Truman delegated authority in Korea and President Johnson delegated the Russell Amendment callup authority in 1968 for Vietnam.[94]

This delegation could set precedent for testing the 200K provisions and could thereby depoliticize the use of small

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[81] 1980 U.S. Code Cong. & Admin. News 7008.

[82] 10 U.S.C. § 673b(g) (1982).

[83] 1986 U.S. Code Cong. & Admin. News 6413-6535; 10 U.S.C. § 673b(b).

[84] 1976 U.S. Code Cong. & Admin. News 1034, 1040.

[85] President Truman declared a national emergency for Korea in Proclamation No. 2914, 1950 U.S. Code Cong. & Admin. News 1557.

[86] President Nixon called 768 officers and 3,891 enlisted National Guard members to active duty during the 1970 postal strike under 10 U.S.C. §§ 3500 and 8500; Exec. Order No. 11,519 (1970), 1970 U.S. Code Cong. & Admin. News 6235; Naval Reservist News, March 1988, at 2.

[87] 1976 U.S. Code Cong. & Admin. News 1034, 1040.

[88] Congress declared a "national exigency" and not a national emergency in the Gulf of Tonkin Resolution. *See supra* note 8.

[89] 1976 U.S. Code Cong. & Admin. News 1040; Naval Reservist News, June 1988, at 4.

[90] Naval Reservist News, August 1988, at 3.

[91] 50 U.S.C. §§ 1541-1548 (1982); *see* 10 U.S.C. § 673b(h). While the War Powers Act is not automatically invoked by the callup of Reserves, the provisions may be triggered when reservists who have been called up are introduced into hostilities. 1976 U.S. Code Cong. & Admin. News 1034, 1039. As a practical matter, however, the introduction of reservists would have no added effect, war powers-wise, as active duty personnel in the area of hostility would have triggered the provision anyway.

[92] *See* Navy Leg. Prop. 84-4 (Oct. 4, 1984).

[93] The President "may authorize the Secretary of Defense" to order any unit to active duty (other than for training) for not more than 90 days. 10 U.S.C. § 673b(a) (1982). Delegation authority is contained in 3 U.S.C. § 301 (1982).

[94] *See supra* notes 9 and 85.

portions of the 200K authority during a relatively peaceful time. Subsequently, the Secretary of Defense and the service secretaries, in low-intensity crises, would then be able to conduct a low-key callup of a limited number of preidentified critical units or individuals with critical skills. This would be an improvement over the current requirement that the President personally invoke the callup.[95]

Mobilization Exercises

Another murky area concerns the legal authority to conduct mobilization exercises. Since JCS Exercise NIFTY NUGGET in 1978, mobilization exercises have taken on more importance and realism in the development and pursuit of a successful mobilization program. Recently, tests have been conducted of the Selected Reserve, the IRR, and the industrial base. These tests, as well as gaining command mini-mobilization exercises (where reservists report to the units to which they are assigned during wartime), have increased the readiness of the Reserve components. There have been recommendations that these exercises be expanded to include lower echelon units and bases. The Goldwater-Nichols DOD Reorganization Act[96] has put added emphasis on this readiness and training.

Analysis of Legislative History

An example of the type of confusion over the meaning and use of the "active duty" terms in the Code is illustrated by an analysis of the proper legal authority used in Secretary Weinberger's 1987 test of the 200K callup authority under 10 U.S.C. § 673b in a serial exercise prior to JCS Mobilization Exercise PROUD SCOTT 88. Could section 673b itself be used to test the 200K callup? If not, what is the best legal authority to use for a test of recall of the Selected Reserve?

The Active Duty Provisions

The analysis begins at chapter 39 of Title 10, which contains the so-called "active duty" provisions of the U.S. Code. Among them is section 673b, which provides the authority to order not more than 200,000 Selected Reservists to "active duty (other than for training)" when the President determines that it is necessary to augment the active forces for any operational mission. The plain meaning of this provision is that the reservist called under this section should be used for operational missions and not for training or testing. This plain meaning interpretation is clouded, however, because section 672 uses this same "active duty (other than for training)" language when describing the ACDUTRA and voluntary duty provisions, both of which could be used for training or testing.[97]

While the definition of "active duty" contained in the definitional section of the Code in 10 U.S.C. § 101(22) covers "full time duty in the active military service of the United States," and also includes "full time training duty," "annual training duty" (ATD), and attendance at a service school while in the "active military service," it does not contain a word concerning "active duty (other than for training)." Thus, while ATD might qualify as active duty under this definition, it is questionable whether section 673b's or 672's "active duty (other than for training)" provisions could be used to allow a test of the 200K provision.

Given the ambiguity of the various active duty Code provisions, could the legislative history help us with this seeming contradiction? As you might expect from the plain language of the provision, the legislative history of section 673b states that the 200K provision should be used for hard core operational missions, not for training or disaster relief.[98] Because JCS Exercise PROUD SCOUT was a test that simulated the 200K callup and partial or full mobilization, it appeared that DOD could not use the callup provisions of either sections 672(a) or 673b in the exercise, because 672(a) requires an actual national emergency and 673b is confined to operational missions, not mobilization tests. Thus one could reasonably arrive at the anomalous conclusion that 673b could not be used to test its own 200K provision.

The Training Provisions

Could the fifteen-day involuntary "active duty" provision of 10 U.S.C. § 672(b) be used for mobilization training exercises? There again, the plain language interpretation leads to a strained interpretation of this ACDUTRA provision. A strict constructionist would argue that the plain meaning of section 672(b)'s fifteen-day involuntary callup provision would preclude its use for training because the provision states quite clearly that it is "active duty" and not ACDUTRA. Given the absurd result in the plain language construction, it is better to interpret the provision broadly by using 10 U.S.C. § 101(22)'s definition of active duty as including "annual training duty," thereby making it permissible to use 672(b) to test the 200K callup.

Unfortunately, the legislative history of section 672 tends to confirm the strict construction interpretation, but in a rather roundabout and unclear fashion. The predecessor of the general war or national emergency callup provision of section 672 was section 233 of the Armed Forces Reserve Act of 1952. At that time, the Armed Forces Reserve Act's general definition section had defined

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[95]Current practice is for individuals in the Seabees, cargo handling battalions, and other critical Navy units to sign contracts which require them to "volunteer" in the event of a crisis. Many feel these contracts are unenforceable and may need legislative authority to back them up.

[96]Pub. L. No. 99-433, 100 Stat. 992 (1986).

[97]10 U.S.C. § 672(b) and (d) (1982).

[98]1976 U.S. Code Cong. & Admin. News 1038-1039; 10 U.S.C. § 673b(b).

"active duty" as "full-time duty in the active military service of the United States, other than active duty for training," thereby excluding "active duty for training" from the definition of active duty.[99]

Section 233(c) of the Act provided that any unit and members thereof could be ordered to involuntarily perform "active duty" or "active duty training," not to exceed fifteen days annually.[100] Thus, Congress apparently intended the involuntary fifteen-day "active duty" provision of section 672(b) to include "active duty training" in what had been quaintly referred to in an earlier era as "summer camp or summer cruise."[101]

In 1956 the current section 672 codified and replaced section 233 of the Armed Forces Reserve Act. Title 10 redefined "active duty" to include "annual training duty" and amended sections 672(b) and (d) to their present form by omitting the words "active duty for training," assuming the term was covered by the words "active duty."[102] Thus, the 1956 revisions deleted any distinction between active duty and active duty for training, at least in regard to sections 672(b) and (d) and seemed to create a "one size fits all" definition of Reserve duty.

This conclusion is underscored by the fact that the 1958 revisions to the wartime expansion unit callup provisions amended section 672(c) by substituting the words "on active duty (other than for training)" for the words "may be required to perform active duty."[103] This seems to indicate that, where callups occurred in times of emergency, Congress preferred to use the term "active duty (other than for training)" to indicate that this was not to be training duty.

Analysis of section 270 of Title 10 gives us another opportunity to examine some other ambiguities in the terms used to describe Reserve duty under Title 10. For instance, sections 270(a) and (b) seem fairly straightforward in their use of the term ACDUTRA, except for the fact that section 270(c) refers back to this ACDUTRA as "active duty" and also as "annual training duty." This appears to be in keeping with the definitional section of Title 10, which the legislative history says reflects the adoption of terminology representing the closest approximation of the ways that the terms have been most commonly used.[104] As noted above, it uses the expansive definition of "active duty" as meaning "full time duty in the active military service of the United States." This encompasses both "annual training duty" (ATD) and "full time training duty," which appear to be other variations of the term ACDUTRA.

These vague terms and sometimes contradictory provisions lead one to wonder whether there are any other significant differences between callup under these various sections in terms of entitlements, pay, duty status, or legal status. For instance, does the "kinds of duty" provision of 10 U.S.C. § 682—which allows a Reserve component member on "active duty other than for training" to be detailed or assigned to any duty authorized by law for the Regular components—mean that reservists on ACDUTRA may not be assigned the same duties as their Regular counterparts? One would hope not, because of the many varieties of duty reservists perform on ACDUTRA under the Total Force Policy.[105]

In actual practice, the test callup in JCS Exercise PROUD SCOUT 88 used the mandatory ACDUTRA training requirements of 10 U.S.C. § 270(a) for Reserve personnel and 32 U.S.C. § 502(f) for Guard personnel to test the 200K callup provision of 673b,[106] in part because the DOD Appropriations Act for FY 1989 specified that Reserve personnel funds were for "active duty" under the training provisions of 10 U.S.C. § 265 or the voluntary duty provisions of 10 U.S.C. § 672(d). Numerous questions remain, however. Does section 672(b)'s use of the term "active duty" require the use of active duty funds or Reserve personnel funds? Are there any real world differences between the use of these provisions? If so, this would be another reason to standardize and clarify these terms.

Specialized Callup Provisions

Involuntary Callup Under the UCMJ

In response to the Court of Military Appeals decision in *United States v. Caputo*,[107] Congress in 1986 revised sections 2 and 3 of the Uniform Code of Military Justice (UCMJ).[108] This revision changed the law to permit ordering a member of the Reserve components to active duty for investigation, trial by court-martial, or nonjudicial punishment for offenses committed while on prior "active duty"

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[99] *See* Armed Forces Reserve Act of 1952, Pub. L. No. 82-476, codified at 50 U.S.C. § 961 (1982).

[100] 1952 U.S. Code Cong. & Admin. News 460, 468.

[101] 1952 U.S. Code Cong. & Admin. News 2005, 2009.

[102] 1956 U.S. Code Cong. & Admin. News 1336, 1369.

[103] 1958 U.S. Code Cong. & Admin. News 4615, 4621.

[104] *See* Explanatory Notes, 10 U.S.C.A. § 101 (1982).

[105] For instance, the tanker mission for the Libyan raid was performed by Air Guardsmen on ACDUTRA under 10 U.S.C. § 672(d).

[106] *Compare* Memorandum of David J. Armor (Aug. 21, 1987) (citing 10 U.S.C. § 672(b) ACDUTRA provision for test callup) *with* Memorandum of Acting Assistant Secretary of Defense for Reserve Affairs, Dennis R. Shaw (Sept. 29, 1987) (concerning 200k test).

[107] 18 M.J. 259 (C.M.A. 1984).

[108] 10 U.S.C.A. § 802(d)(1) (West Supp. 1988).

or "inactive-duty training."[109] In addressing the *Caputo* decision, Congress clarified that a member of a Reserve component is not, by virtue of the termination of a period of active duty or inactive-duty training, relieved from amenability to jurisdiction under the UCMJ for an offense committed during prior active duty or inactive-duty training.[110]

Involuntary Ready Reserve Callup

10 U.S.C. § 673a provides that, at any time, the President may order any member of the Ready Reserve to active duty when the individual has not fulfilled his or her statutory reserve obligation or when the individual is not assigned to, or participating satisfactorily in, a unit of the Ready Reserve.[111] This is a remnant of the now-expired Russell Vietnam Amendment, which allowed the President in 1968-69 to activate reservists and Reserve units for up to twenty-four months without having to declare a national emergency.[112]

While this provision on its face appears to be intended to be used as a punitive measure for nonperformance of drills by an obligated reservist, it has also been held by the United States Court of Appeals for the Eighth Circuit to include authority to mobilize "any member not assigned to a unit of the Ready Reserve, whether or not that person is performing satisfactorily." For instance, in *Dix v. Rollins*[113] the Eighth Circuit employed a broad construction of the power to mobilize (as did other courts in general)[114] to uphold the mobilization of an Army reservist whose unit had been abolished by the government, through no fault of his own. The court used the "not assigned to a unit" language of section 673a.[115]

Reservists in Captive Status

Another 1986 amendment to Title 10 contained in section 672(g)(1) allows members of the Reserve components to be involuntarily ordered to active duty when they are in a captive status. The object of this provision is to protect reservists who might be captured or injured as a result of their military duties or affiliation, such as when Middle Eastern terrorists hijacked a TWA aircraft and killed a Navy Seabee in 1985. Under this provision, reservists cannot be required to stay on active duty without their consent for more than thirty days after their captive status is terminated. This provision[116] recognizes the blurring of differences between training and operational mission active duty, such as the compression of missions mentioned by Secretary Webb. It also underscores the fact that even fifteen days of training duty may put Reserve component personnel in harm's way by reason of hijacking or terrorism on the way to or from training duty,[117] to say nothing about the hazards encountered at the reservist's training site.

Mobilization of Reservists

As noted above, section 673b of Title 10 of the U.S. Code provides the authority to call up to 200,000 personnel to "active duty (other than for training)" to augment operational missions and serve as an augmentation vehicle in a crisis situation. In case of more dire circumstances (a national emergency), sections 672 and 673 of Title 10 contain a number of other general mobilization provisions that may be invoked for Reserve and Guard personnel alike.

Ready Reserve Partial (One Million) Presidential Mobilization

10 U.S.C. § 673(a) provides that, in time of national emergency declared by the President under 50 U.S.C. § 1601,[118] an authority designated by the Secretary concerned may involuntarily order any Ready Reserve unit and any member not assigned to a unit organized to serve as a unit to "active duty (other than for training)" for not more than twenty-four consecutive months. Section 673(c) of Title 10 provides that not more than 1,000,000 personnel, of the almost 1.7 million members of the Ready Reserve, may be on "active duty (other than for training)" under 10 U.S.C. § 673 without their consent. The Department of Defense has taken the position in Exercise PROUD EAGLE 90 that this 1 million persons is in addition to the 200,000 persons called under the 200k.

Those personnel called under section 673 do not count toward active duty end strengths, and consent of the Governors of the affected states is not required. In recognition of the Korean War experience, the Secretary of Defense is required to prescribe policies and procedures necessary to take into account the length and nature of previous service of those called in order to assure sharing of "exposure to

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[109] 10 U.S.C.A. 803(d) (West Supp. 1988).

[110] *Id.*

[111] Military Selective Service Act of 1967, Pub. L. No. 90-40, 81 Stat. 100 (1967).

[112] Defense Appropriations Act of 1967, Pub. L. No. 89-687, 80 Stat. 981 (1966); *see supra* note 9 and accompanying text.

[113] 413 F.2d 711 (8th Cir. 1969).

[114] *E.g.*, Johnson v. Powell, 414 F.2d 1060 (5th Cir. 1969); Sullivan v. Cushman, 290 F. Supp. 659 (D. Mass. 1968).

[115] *Dix*, 413 F.2d at 715.

[116] Defense Authorization Act of 1987; Pub. L. No. 99-661, 100 Stat. 3816 (1986); 1986 U.S. Code Cong. & Admin. News 6416, 6535.

[117] Another example of this jeopardy would be where reservists performed their ACDUTRA off Lebanon, aboard the battleship New Jersey.

[118] The National Emergencies Act of 1976 would be the basis for a Presidential declaration of a national emergency. 50 U.S.C.A. §§ 1601-1651 (West Supp. 1989).

hazards."[119] Direction for this mobilization planning is contained in the DOD Master Mobilization Plan.[120] Procedures for the mobilization of the Ready Reserve are set forth in DOD Directive 1235.10.[121]

Reserve Component Full Mobilization

A similar provision, 10 U.S.C. § 672(a), provides that, in time of war or national emergency declared by Congress (as opposed to the President) or when otherwise authorized by law, the Secretary concerned may involuntarily order any unit of the Reserve component and any member not assigned to a unit organized to serve as a unit to "active duty (other than for training)" for the duration of the war or emergency and for six months thereafter, rather than the twenty-four months under a Presidential declaration. This declaration of a national emergency also permits the President to invoke or suspend a number of laws relating to contracts, government property, and other provisions during the emergency.[122] There is no limit to the number of persons called or the duration of the call under this provision, except the specific provision that the callup can be for the duration of the war or emergency,[123] and the requirement that there are not enough qualified reservists in an active status who are readily available.[124]

Total Mobilization

Total mobilization is an expansion of the Armed Forces by the Congress and the President to organize or generate additional units or personnel beyond the existing force structure. This includes the resources needed to support the total requirements of a war or other national emergency involving an external threat to the national security.

Force Expansion Provisions

Section 672(c) of Title 10 expresses a decided preference for callup of the Reserve component as units during a crisis expansion. This preference has been a part of the law since the National Defense Act of 1916.[125] It provides that, so far as practicable, when the active forces are being expanded with units and members of the Reserve components being ordered to "active duty (other than for training)," they shall be called up as units if they were organized and trained to serve as units. For instance, groups such as Fighter Squadrons should be called up as a unit. Other reservists, such as Individual Mobilization Augmentees, who are assigned to organizations that are not designed to serve as units after mobilization, can be called up individually.

To provide flexibility, however, section 672(c) states that, under appropriate circumstances, even individual members of units "organized and trained to serve as units" may be ordered to active duty apart from their units.[126] Also, the units called can be reassigned after being ordered to active duty. Moreover, there is no size requirement for the units called, as the legislative history indicates that as few as two persons can comprise a unit, the definition of which was to be made by the Department of Defense.[127] This gives the Armed Forces maximum flexibility in obtaining and assigning personnel.

The Montgomery Amendment and Section 672

While Guard units and Guard personnel may not be ordered to active duty under section 672 without the consent of the Governor of the state or territory concerned, Guard personnel may be required to serve up to ninety days to augment operational missions under 10 U.S.C. § 673b without gubernatorial approval. The 1986 Montgomery Amendment to the general mobilization provision was intended to clarify the controversy surrounding the limits of section 672 authority, the Army clause, and the militia clause of the Constitution.[128] Instead, the amendment reopened a debate as old as the Republic itself.

The controversy over the states' role in the militia first arose during the Constitutional Convention. The colonies had inherited an historical distrust of standing armies on the one hand, and an historical dependence on the use of the militia on the other. The Constitution adopted an apparent compromise by authorizing both a standing army[129] and a militia. The militia was to be organized, administered, armed, and disciplined by Congress under

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[119] 1952 U.S. Code Cong. & Admin. News 2016.

[120] DOD Dir 3020.36-P, Master Mobilization Plan (1988).

[121] Ordering the Selected Reserve to Active Duty to Augment the Active Forces for an Operational Mission (1989 Draft).

[122] For a good discussion of wartime mobilization legal authorities, see the Department of the Air Force's Digest of War and Emergency Legislation affecting the Department of Defense, maintained by HQ USAF/JACO, Room 5E417 of the Pentagon, Washington, D.C. 20330 (Tel. 694-8226). Another useful tool is the computerized DOD Emergency Authorities Retrieval and Analysis System (DEARAS) maintained by the DOD Office of General Counsel.

[123] Excellent crisis resources are the OSD Emergency Action Packages ("EAPs"), a computerized checklist and sample of the documents needed to implement subjects such as the 200K recall of reservists, noncombatant evacuation operations, CRAF, NDRF, and other general mobilization authorities. These documents are maintained by the OSD Office of the Deputy Under Secretary for Policy.

[124] 10 U.S.C. § 672(a) (1982).

[125] 1952 U.S. Code Cong. & Admin. News 2054.

[126] 10 U.S.C. § 672(c) (1982).

[127] 1980 U.S. Code Cong. & Admin. News 7009; DOD Dir 1235.10, para. (F)(7).

[128] *See* Hearings on Federal Authority Over National Guard Training Before the Subcommittee on Manpower and Personnel of the Senate Committee on Armed Services, 99th Cong., 2d Sess. (1986) (unpublished).

[129] The army clause provides: "The Congress shall have Power ... To raise and support Armies ... "; U.S. Const. art. I, § 8, cl. 12.

the army clause[130] to execute the laws of the union, suppress insurrections, and repel invasions, and was to be governed by the states, except when in federal service.[131]

Historically, the militia, as formulated by the Constitution, was inadequate.[132] Consequently, in 1903 Congress passed the Dick Act,[133] which provided for an organized militia known as the National Guard. The National Guard was to be equipped by the Federal Government and trained at drills run by regular Army instructors. Later, under the National Defense Act of 1916,[134] the National Guard, largely paid for by the Federal Government, was made available for service abroad when it was "federalized" by the U.S. Government. Each member of the National Guard had a dual status: 1) as a member of the militia under the governor of the state concerned, and 2) as a reservist under the President when in federal service.[135]

This set the stage for the Governor of Massachusetts, Michael Dukakis, and the Governor of Minnesota, Rudy Perpich, to bring separate suits in United States district courts against the Department of Defense over the training of Guard personnel in Honduras under 10 U.S.C. § 672(b) and (d). The suits questioned the constitutionality of the Montgomery Amendment, 10 U.S.C. § 672(f), which prohibited the Governors from effectively prohibiting the use of their Guard units in Central America. Under the Montgomery Amendment, a state Governor may not withhold consent to duty of Guard units under the fifteen-day training duty of section 672(b) or the voluntary active duty provisions of 672(d) because of any objection to the location, purpose, type, or schedule of such "active duty" outside the United States. Even under the Montgomery Amendment, however, a Governor still retains the authority to block the proposed training if the Guard personnel are needed at home for appropriate local emergencies, such as a flood or other natural disaster.[136] In both cases, the district courts held against the Governors, ruling that the Montgomery Amendment was a valid exercise of the power of Congress under the armies clause of the Constitution, that the amendment did not violate the militia clause, and that the Department of Defense was within its authority in providing for active duty in Central America. The United States Court of Appeals for the First Circuit summarily affirmed the Massachusetts District Court decision.[137]

This ruling by the First Circuit would have ended the controversy if the Eighth Circuit had not overruled the Minnesota District Court opinion.[138] In an extensive 113-page opinion, an Eighth Circuit panel reversed the district court's decision and held that the Montgomery Amendment deprived the states of the "authority of training the militia" and therefore violated the militia clause of the Constitution.[139] In a decision that some liberal news reporters read with glee,[140] the Eighth Circuit read the legislative history of the Constitution in the Federalist Papers as evidencing an overriding intent of the Founding Fathers to have states exercise control over the militia (National Guard) under the militia clause and second amendment[141] as a check on abuse of military power by the Federal Government. Under the court's reasoning, the only time the army clause would prevail over the protection of states under the militia clause would be in situations in which the national security was threatened.[142] The Supreme Court has recently granted certiori to review the First Circuit decision upholding the constitutionality of the Montgomery Amendment and the Eighth Circuit reversed *en banc* the 1988 decision of its three judge panel and affirmed on rehearing *en banc* the decision of the district court.[143]

Involuntary Recall of Standby Reserve

10 U.S.C. §§ 672 and 674 allow the callup of the Standby Reserve (those who maintain their military affiliation without being in the Ready Reserve or Retired

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[130] U.S. Const. art. I, § 8, cl. 16.

[131] U.S. Const. art. I, § 8, cl. 15; Wiener, *Militia Clause of the Constitution*, 54 Harv. L. Rev. 181, 184 (1940).

[132] Wiener, *supra* note 131, at 182-88; *Perpich*, 666 F. Supp. at 1322.

[133] Ch. 196, 32 Stat. 775 (1903).

[134] Ch. 134, 39 Stat. 166 (1916).

[135] Wiener, *supra* note 131, at 200-01.

[136] 1986 U.S. Code Cong. & Admin. News 6534.

[137] *Dukakis*, 859 F.2d at 1066-67.

[138] *Perpich*, 57 U.S.L.W. at 2345.

[139] The Constitution provides that the Congress shall have the power "To provide for calling forth the Militia to execute the Laws of the Union, suppress Insurrections and repel Invasions; To provide for organizing, arming, and disciplining, the Militia, and for governing such Part of them as may be employed in the Service of the United States, reserving to the States respectively, the Appointment of Officers, and the Authority of training the Militia according to the discipline prescribed by Congress." U.S. Const., art. I, § 8, cls. 15 and 16.

[140] *E.g.*, Scheffer, *The Framers and the National Guard*, Washington Post (Feb. 28, 1989).

[141] The second amendment to the Constitution provides: "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed."

[142] *Perpich*, slip op. at 29.

[143] *See supra* notes 11 and 21.

Reserve) in case of national emergency or war declared by Congress for the duration of the conflict, plus six months. Because of problems with World War II combat veterans being recalled for combat duty in Korea when non-combat reservists were not called, this provision requires that before the Standby Reserve can be called there must be a determination that there are not enough Ready Reservists available. A provision that the Director of the Selective Service must determine that the veteran is available for duty, which was designed to provide a civilian buffer for retirees, was dropped in 1976. Procedures for management and mobilization of the Standby Reserve are set forth in DOD Directive 1235.9.

Recall of Retirees

Involuntary Recall of Retired Reserve

10 U.S.C. §§ 672 and 675 authorize the mobilization of the Retired Reserves in time of war or national emergency in much the same way the Standby Reserves are mobilized—when there are not enough qualified reservists. Thus, Selected Reservists are called first, the Standby Reserve next, and then the Retired Reserve and Regulars. The Retired Reserve consists of over 1,600,000 Reserve officer and enlisted personnel who receive retired pay on the basis of their active duty or Reserve service.[144]

Involuntary Recall of Retired Members of the Regular Component

Under regulations prescribed by the service secretaries, a retired member of the Regular component can be recalled at any time. After being placed in the Retired Reserve, once a war or national emergency is declared, the member cannot be called up unless there are not enough qualified Reserve or Guard personnel.[145]

Involuntary Recall of Fleet Reserve

Under 10 U.S.C. § 6485, members of the Navy Fleet Reserve and Marine Corps Fleet Reserve[146] can be recalled in time of war, national emergency, or when otherwise authorized by law.[147] Note, however, that 10 U.S.C. § 6485 does not contain the provision that "qualified reservists" be available before retired enlisted Fleet Reserve and Fleet Marine Corps personnel can be recalled. Thus, it appears that regular retired Navy and Marine Corps personnel can be recalled under a less stringent test than their counterparts from other services, although present law is some improvement for retired people. Previously, they were subject to recall under executive order without the need for declaration of a national emergency. The authority to recall by executive order was repealed in favor of the present provision of recall only in time of national emergency or war.

Domestic Disturbances and Disaster Relief

Domestic Civil Disturbances and Insurrections

To keep order, the Governor of a state may use the National Guard forces under Title 32. In addition, the states that have them may use their state defense forces[148] or even their naval militia to keep the peace.[149] In addition, 10 U.S.C. §§ 331-335 authorizes the President to use the militia (National Guard and organized militia) and the Armed Forces to suppress any insurrection, domestic violence, unlawful combination, or conspiracy upon request by state authorities.[150] This authority was used several times to keep order in Alaska, Arizona, and the Indian Territories, and the courts gave the President almost absolute authority to invoke its provisions.[151]

The President also invoked the power of 10 U.S.C. §§ 332 and 333 by proclamation to use the National Guard and federal troops to keep order during the 1957 Little Rock, Arkansas, school integration disturbances.[152] Interestingly, the Governor of Arkansas had mobilized the Guard and given them instructions to preserve the racial segregation in schools when the President mobilized them to do just the opposite.[153] Note, however, that state defense forces organized under 32 U.S.C. § 109 are creatures of the state and therefore are not subject to federal call as are the Guard in federal service, Reserves, and certain naval militia.[154]

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[144] 10 U.S.C. § 274 (1982).

[145] 10 U.S.C. §§ 672, 675, 688, 6485; *see* DOD Dir. 1352.1 (Management and Mobilization of Retired and Regular Military Retirees (Feb. 27, 1984)).

[146] Enlisted Navy and Marine Corps regular and Reserve members with more than 20 but less than 30 years service are placed in the Fleet Reserve. After 30 years of active and Fleet Reserve Service, they are assigned to the Retired Reserve and Retired Regular lists, respectively.

[147] The constitutionality of recall of a Fleet Reservist under the Naval Reserve Act of 1938 (34 U.S.C.A. § 855, 52 Stat. 1180) was upheld in United States v. Fenno, 76 F. Supp. 203 (D. Conn. 1947), *aff'd*, 167 F.2d 593 (2d Cir. 1948), *cert. dismissed*, 335 U.S. 806 (1948).

[148] 32 U.S.C. § 109 (1982)

[149] 10 U.S.C. §§ 7851-7854 (1982).

[150] *See* DOD Dir 3025.12, Employment of Military Resources in the Event of Civil Disturbances (Aug. 18, 1988).

[151] *See* annotations to 10 U.S.C. § 332.

[152] For a description of the Militia callup process, see 41 Op. Att'y Gen. 313 (1957).

[153] *Id.*

[154] Naval Militia may be called by the Federal Government when 95% of its members are members of the Naval Reserve. 10 U.S.C.§ 7854 (1982).

Also, 10 U.S.C. §§ 3500 and 8500 allow the President to call the Army and Air National Guard into federal service when there is danger of invasion or rebellion against the authority of the United States Government, and when the President is unable to execute the laws of the United States with regular forces.

Posse Comitatus

The power of the Federal Government to quell insurrections with state militia and federal forces is an exception to the posse comitatus provisions (the power of a county to enforce its laws) contained in 18 U.S.C. § 1385. This law was enacted in 1878 following the Civil War reconstruction era when excesses committed by Union troops in the South prompted Congress to prohibit the Army and later, the Air Force, from enforcing the civil laws in the states. Note that the Navy is not specified in the legislation and therefore technically is not subject to it as a matter of law.

There have been some inroads into the posse comitatus prohibition caused by 10 U.S.C. §§ 371-379, as implemented in DOD Directives 5001 and 5525.5 and, most recently, the DOD Authorization Act for FY 89. These provisions allow DOD to authorize the military to cooperate with civilian authorities in providing information, equipment, facilities, training, and personnel assistance, provided this does not adversely affect military preparedness. The Omnibus Drug Act of 1986 made further inroads by permitting the stationing of law enforcement personnel in ships. The posse comitatus provision reflects the fact that, under the Constitution and laws of the United States, the state and local governments are responsible for protection of life and property under our federal system of government. Thus while federal forces are subject to posse comitatus, state forces, including the National Guard under state control, are not.

Use of Reserves for Disaster Relief

While the Coast Guard has explicit authority to call up Ready Reserve personnel for natural disasters,[155] questions exist about the use of a Reserve callup from other services in a disaster situation.[156] Upon Presidential declaration of a major disaster, the Disaster Relief Act[157] allows any federal agency to provide disaster assistance. The Act provides that, after issuing a major disaster declaration, the President may direct any federal agency to use its personnel and material resources in support of local disaster assistance.

It has been argued that once the President has signed an executive order declaring a disaster or localized emergency, the Secretary of Defense and the services might then use the fifteen-day voluntary active duty provisions of 10 U.S.C. § 672(b) or the national emergency provisions of 10 U.S.C. § 673(a) to provide the Reserve personnel necessary for disaster relief.[158]

This approach is not without its problems. First, the President makes a "major disaster declaration" under 42 U.S.C. § 5142 and does not make the "declaration of national emergency" necessary to invoke the provisions of 10 U.S.C. § 673(a).[159] Second, while the President is authorized to use Active component personnel for disaster relief, the involuntary callup of Reserve personnel might be prohibited. As shown above, the provisions of section 672(b) were originally intended to be used for reservist training and that section is silent as to disaster relief. In addition, Congress made it clear in 10 U.S.C. § 673b(b) that the operational mission provision of 10 U.S.C. § 673b was not to be used for disaster relief, and by analogy, this reasoning may also apply to 672(b).[160] Thus, to achieve the desired end, one would have to ignore specific legislative history. Given these uncertainties, it would appear prudent to make disaster relief authority explicit in the next version of the callup provisions.

Conclusion

Given the changing nature of the mission of the Reserves in the Total Force and the modern blurring of distinctions between drills, active duty for training, and active duty, the "one size fits all" definition of active duty in 10 U.S.C. § 101(22) seems to be the most preferable concept to use in describing Reserve duty under the "compression of missions under the Total Force Policy" mentioned by Secretary Webb and others.[161] It appears to make sense in the modern world to treat all Reserve duty the same because reservists currently perform everything from drug interdiction, operational missions, and training under a number of duty provisions. Under current operations, Reserve component personnel could come under hostile fire, either under the 200K callup provisions of section 673b, the fifteen-day training provisions of section 672(b), or the voluntary callup provisions of section 672(d).[162]

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[155] 14 U.S.C. § 712 (1982).

[156] Some legal questions surrounded the use of Army Reservists in the aftermath of the 1987 American Samoan hurricane, which President Reagan declared a major disaster under Public Law 93-288 on January 24, 1987. A broad interpretation of sections 672(b) and 672(a) was utilized to find that there was sufficient legal authority to use the Army Reserve in Samoa in the disaster relief efforts undertaken there.

[157] 42 U.S.C. § 5142(a), Pub. L. No. 93-288, 88 Stat. 143 (1974); *see* DOD Dirs. 3025.1 and 5100.46.

[158] Pub. L. No. 93-288, 88 Stat. 143 (1974).

[159] 50 U.S.C. §§ 1601-1616. *See* DOD Dirs 3025.1, Use of Military Reserves During Peacetime Civil Emergencies (May 23, 1980); 5100.46, Foreign Disaster Relief (Dec. 4, 1975).

[160] Legislative history in the form of a House Report indicates section 672(b) is to be used for training. 10 U.S.C. § 673b. *See* 1976 U.S. Code Cong. & Admin. News 1038. 10 U.S.C. § 673b is not to be used for disaster relief.

[161] Federal Authority Over National Guard Training Before the Sen. Subcomm. on Manpower & Personnel, 99th Cong., 2d Sess. (1986).

[162] Washington Post, *U.S. Reservists Fired Upon in Rural Honduras*, April 14, 1989, at A23.

To adopt this broad interpretation, however, requires one to overlook a lot of seemingly contradictory specific statutory language and legislative history, which, it must be presumed, Congress knew about when it enacted all of these provisions.

Who is to say when a routine antisubmarine warfare training patrol might become an operational mission when hostile forces are encountered, or when an air refueling mission being performed by reservists might become a part of a raid, such as the one on Libya? Although there does not yet seem to be a clear and present danger in terms of a present pressing need to clarify the use of these terms, the evolving expanded use of the Reserve components under current budget restraints dictates that a thorough review and examination of the legal and fiscal ramifications of the provisions listed above be conducted. These provisions should be standardized to reduce confusion about their use and revised to harmonize them with the military realities of the Total Force in the 1990s and beyond.

Appendix

List of Recommendations

1. Establish a joint service task force to review and make recommendations on update of Reserve callup provisions and implementing directives.

2. Establish a low-key flexible mobilization callup authority that can be tailored to cover the spectrum of low intensity to high intensity crisis operations.

3. Develop and implement more flexible drilling, training, and active duty procedures to augment gaining commands during regular working hours and in crisis situations.

4. Develop standardized use of active duty terms designed to eliminate artificial distinctions between active duty and ACDUTRA which hamper the effectiveness of the Ready Reserve.

5. Clarify the authority to order tests of the 200K and other callup authorities.

6. Clarify that the active duty provisions of 10 U.S.C. § 672(b) may be used for both training and operations.

7. Clarify which, if any, of the Reserve callup provisions may for used for disaster relief.

8. Integrate mobilization planning with operational planning by expanding command post mobilization exercises.

Interviewing Bargaining Unit Employees

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Introduction

Imagine sitting at your desk preparing for a Merit Systems Protection Board[1] (MSPB) hearing that is scheduled for the following week. You determine that you will need three employees to testify. The three employees are all members of the American Federation of Government Employees (AFGE) bargaining unit. You send a memo to the employees' supervisors asking them to have the employees in your office at one o'clock on Wednesday. You then call the Labor Relations Specialist (LRS) and inform her of the scheduled interviews. The LRS will sit as co-counsel, and you want her present during the interviews. She informs you that the Chief, Management Employee Relations (MER) Branch, also wants to attend. You agree.

At 12:55 the following Wednesday (five minutes before the first scheduled interview), the president of AFGE enters your office. He insists that he has a right to attend the interviews. You inform him that he has no right to be present during the interview of the agency's witnesses. He tells you that Title VII of the Civil Service Reform Act of 1978[2] gives him the right. Is he correct? Does the interview of a bargaining unit employee constitute a formal discussion? The answer to these questions begins with an examination of the definition of formal discussion.

The exclusive representative of bargaining unit employees must be given notice and an opportunity to attend a formal discussion. The exclusive representative's rights are summarized in 5 U.S.C. § 7114(a)(2)(A), which states:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> (A) any formal discussion between one or more representatives of the agency and one or more employees in the unit or their representatives concerning any grievance or personnel policy or practices or other general condition of employment.

[1] The Merit Systems Protection Board was established in January 1979 by Reorganization Plan No. 2 of 1978. The board's duties and authorities were specified in the Civil Service Reform Act of 1978 (92 Stat. 1121-31 (1978)). The board has the responsibility for hearing and adjudicating appeals by federal employees of adverse personnel actions, such as removals, suspensions, and demotions. It also resolves cases involving reemployment rights, the denial of periodic step increases in pay, action against administrative law judges, and charges of merit system violations. Final decisions of the board can generally be appealed to the U.S. Court of Appeals for the Federal Circuit.

[2] Civil Service Reform Act of 1978, 5 U.S.C. §§ 7101-7135 (1982).

The Federal Labor Relations Authority[3] stated in *HHS v. AFGE*[4] that all elements of section 7114(a)(2)(A) must be present before the exclusive representative's rights attach. Therefore, in order for the exclusive representative to have a right to be present during an interview of a bargaining unit employee, there must be:

> —a formal discussion between one or more representatives of the agency and one or more unit employees or their representatives concerning any grievance, personnel policy or practices, or other general condition of employment.[5]

If any element is missing, the exclusive representative has no rights under section 7114(a)(2)(A).[6] This article will analyze and discuss the four essential elements of a formal discussion and the interrelationship between formal discussion, the *Weingarten* right,[7] and the *Brookhaven* warning.[8]

Formality

To determine whether a meeting or discussion is "formal" within the meaning of section 7114(a)(2)(A), the Authority will consider the totality of the facts and circumstances surrounding the meeting.[9] The following is a list of factors that are critical to the Authority's determination: 1) whether the individual who holds the discussion is merely a first-level supervisor or is higher in the management hierarchy; 2) whether any other management representatives will attend; 3) where the meeting takes place (i.e., in the supervisor's office, at the employee's worksite, or elsewhere); 4) how long the meeting lasts; 5) how the meeting is called (i.e., with formal advance written notice or more spontaneously and informally); 6) whether a formal agenda is established for the meeting; 7) whether the employee's attendance is mandatory; and 8) how the meeting is conducted (i.e., whether the employee's identity and comments are noted or transcribed).[10] This list is not exhaustive.

The Authority will consider the totality of the facts and circumstances of each situation to determine whether a meeting is "formal."[11] If the meeting is not "formal," no further analysis under 5 U.S.C. § 7114(a)(2)(A) is required, and the exclusive representative's rights do not attach.[12] If the meeting is "formal," the next consideration is what constitutes a "discussion between one or more agency representatives and one or more bargaining unit employees."

Discussion Between Agency Representative and Bargaining Unit Employees

If the installation commander asks fifty bargaining unit employees to come to his office to inform them of a change in their working hours, the meeting is considered "formal." If the commander only explains the new policy and does not entertain comments or questions, the meeting is still a "discussion" for the purposes of section 7114(a)(2)(A).

The Authority has held that the word "discussion" is synonymous with "meeting."[13] To hold otherwise, the Authority stated, would allow agencies to circumvent the intent of the Civil Service Reform Act by holding a formal meeting with bargaining unit employees and not engaging in dialogue.[14] Thus, when an agency representative meets with bargaining unit employees concerning grievances, personnel policies or practices, or other general conditions of employment, section 7114(a)(2)(A) requires the agency to give the exclusive representative prior notice of, and an opportunity to be present at, the meeting. This holds true even if the meeting is called to make a statement or announcement rather than to engage in a dialogue.[15]

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[3]The Federal Labor Relations Authority (the Authority) was created by Title VII of the Civil Service Reform Act to provide leadership in establishing policies and guidance relating to matters under Title VII. 5 U.S.C. § 7105 (1982).

[4]Department of Health and Human Services, Social Security Administration and Social Security Administration Field Operations, Region II v. American Federation of Government Employees, AFL-CIO, Local 2369, 29 FLRA No. 89 (1987).

[5]*Id.* at 1207.

[6]Bureau of Government Financial Operations, Headquarters v. National Treasury Employees Union and National Treasury Employees Union Chapter 202, 15 FLRA 423, 425 (1984), *rev'd on other grounds*, NTEU v. FLRA, 774 F.2d. 1181 (D.C. Cir. 1985).

[7]National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251 (1975); *see also* 5 U.S.C. § 7114(a)(2)(B) (1982).

[8]Internal Revenue Service and Brookhaven Service Center v. National Treasury Employees Union, Chapter 99, 9 FLRA No. 132 (1982).

[9]Department of Labor v. American Federation of Government Employees, 32 FLRA No. 69 (1988).

[10]*Id.* at 470.

[11]*Id.*

[12]*Id.*

[13]Department of Defense, National Guard Bureau, Texas Adjutant General's Department, 149th TAC Fighter Group (ANG) (TAC) Kelly Air Force Base v. American Federation of Government Employees, Texas Air National Guard Council of Local, AFL-CIO, 15 FLRA No. 111 (1984).

[14]*Id.* at 532.

[15]*Id.* at 533.

Grievance

The word "grievance"[16] involves that portion of the Civil Service Reform Act that describes the negotiated grievance procedure required in every collective bargaining agreement.[17] The union, the exclusive representative of the bargaining unit employees during the processing of a grievance, has the right to be present at a formal discussion concerning a grievance.[18] The union's exclusivity includes barring an employee from retaining any other representative (except himself) during the grievance procedure.[19] Statutory appeal procedures used by bargaining unit employees do not contain such exclusivity.[20] Employees may, under statutory appeal procedures, retain the representative of their choice.[21]

The question remains, therefore, "Should exclusive representatives have the right to be present during a discussion with a bargaining unit employee concerning a complaint filed under a statutory appeal procedure?" The D.C. Circuit answered this question in *NTEU v. FLRA*.[22] The court stated that the term "grievance" is not limited by section 7121 of the Civil Service Reform Act (i.e., grievances covered by the collective bargaining agreement), but is expanded to include grievances as defined in section 7103(a)(9).[23] Section 7103(a)(9) defines "grievance" as:

> any complaint—
>
> (A) by any employee concerning any matter relating to the employment of the employee;
>
> (B) by any labor organization concerning any matter relating to the employment of any employee; or
>
> (C) by any employee, labor organization, or agency concerning—
>
> (i) the effect or interpretation or a claim of breach of a collective bargaining agreement; or
>
> (ii) any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment.[24]

Relying on section 7103(a)(9) for the definition of "grievance," the court included complaints filed under a negotiated grievance procedure and those filed under a statutory appeal procedure as elements of section 7114(a)(2)(A).[25]

Personnel Policy or Practices or Other Conditions of Employment

The term "general," as used in section 7114(a)(2)(A), was intended to limit the union's right of representation to those formal discussions that concern conditions of employment (personnel policy or practices) and that affect employees in the bargaining unit "generally."[26] A discussion with a bargaining unit employee concerning his or her job performance would not affect other bargaining unit employees generally and therefore does not meet the requirement of section 7114(a)(2)(A).[27] In addition, the

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[16] 5 U.S.C. § 7103(a)(9) defines a grievance as:

> any complaint—(A) by any employee concerning any matter relating to the employment of the employee; (B) by any labor organization concerning any matter relating to the employment of any employee; or (C) by any employee, labor organization, or agency concerning—(i) the effect or interpretation, or a claim of breach of a collective bargaining agreement; or (ii) any claimed violation, misinterpretation or misapplication of any law, rule, or regulation affecting conditions of employment.

[17] 5 U.S.C. § 7121(a) provides "except as provided in paragraph (2) of this section any collective bargaining agreement shall provide for the settlement of grievances, including the question of arbitrability. Except as provided in subsections (d) and (e) of this section, the procedures shall be the exclusive procedures for resolving grievances which fall within its coverage."

[18] Department of Labor v. American Federation of Government Employees, 32 FLRA No. 69 (1988).

[19] 5 U.S.C. § 7121(b) provides that

> any negotiated grievance procedure referred to in subsection (a) of this section shall—... (3) include procedures that— ... (A) assure an exclusive representative the right, in its own behalf or on behalf of any employee in the unit represented by the exclusive representative, to present and process grievances; (B) assure such an employee the right to present a grievance on the employee's own behalf, and assure the exclusive representative the right to be present during the grievance proceeding; ....

[20] 5 U.S.C. § 7121 provides:

> (d) an aggrieved employee affected by a prohibited personnel practice under section 2302(b)(1) of this title which also falls under the coverage of the negotiated grievance procedure may raise the matter under a statutory procedure, but not both ..., (e)(1) matters covered under sections 4303 and 7515 of this title which also fall within the coverage of the negotiated grievance procedure may, in the discretion of the aggrieved employee, be raised either under the appellate procedure of section 7701 of this title or under the negotiated grievance procedure, but not both....

[21] 5 U.S.C. § 7513(b) (1982); 29 C.F.R. § 1601.7 (1984).

[22] 774 F.2d 1181 (D.C. Cir. 1985).

[23] *Id.* at 1186.

[24] 5 U.S.C. § 7103(a)(9) (1982).

[25] *But see* U.S. Department of Justice, United States Marshals Service v. International Council of U.S. Marshal Services Locals, AFGE, 23 FLRA No. 60 (1986) (where the Authority held that pre-complaint counseling procedures in the EEO process did not constitute "statutory procedures" under section 7121(d); instead, the filing of a formal written EEO complaint that commenced litigation proceedings constituted such "statutory" procedures); U.S. Department of Justice, Bureau of Prisons, Federal Correctional Institution (Ray Brook, New York) v. American Federation of Government Employees, AFL-CIO, Local 3882, 29 FLRA No. 52 (1987) (where the Authority concluded that a pre-disciplinary oral reply pursuant to 5 U.S.C. § 7513(b) did not concern a "grievance" within the meaning of section 7114(a)(2)(A)).

[26] 124 Cong. Rec. H9634 (daily ed. Sept. 13, 1978) (statement of Mr. Udall), *reprinted in* Committee on Post Office and Civil Service, House of Representatives, 96th Cong., 1st Sess., *Legislative History of the Federal Service Labor-Management Relations Statute, Title VII of the Civil Service Reform Act of 1978*, Committee Print No. 96-7, at 926 (1979) [hereinafter Legislative History].

[27] Social Security Administration, San Francisco Region v. American Federation of Government Employees, 9 FLRA No. 48 (1982).

word "generally" is associated with conditions of employment and has no impact on grievances. If a discussion concerns a grievance or a complaint filed under a statutory appeals procedure, it meets the requirement of section 7114(a)(2)(A), whether or not it impacts "generally" on the bargaining unit employees. Such discussions, unlike discussions of a personnel policy or practice, may involve a particularized application of a personnel policy to an employee.[28]

Advance Notice and an Opportunity to be Represented

If the four elements of a formal discussion are met, the union has a right to advance notice and to be present at the formal discussion.[29] Advance notice must be given so that the union may choose its own representative to attend.[30] It is not enough for an agency representative to hold a formal discussion in an area where a union official is located. To allow an agency to choose the union's representative by its choice of locations would defeat the union's rights under section 7114(a)(2)(A). In order to satisfy the requirements of section 7114(a)(2)(A), management must give the union advance notice and an opportunity to select its own representative.[31]

When a union representative appears at a formal discussion, the question remains, "Does the representative have a right to speak?" The Authority stated in *NRC v. NTEU*[32] that exclusive representatives have the right to comment, speak, and make statements during a formal discussion. The rule of reasonableness dictates the limits of the representative's comments.[33] The Authority stated that an orderly procedure must be maintained and that union representatives cannot disrupt, usurp, or take charge of the discussion.[34] The Authority will examine the representative's comments, the purpose of the statements, and the totality of the circumstances surrounding the meeting to determine what is reasonable.[35] The crux of the Authority's pronouncements is that the right to be represented means more than merely the right of the exclusive representative to *attend* a formal discussion.

Applying the elements of section 7114(a)(2)(A) as discussed above (a discussion; which is formal; between one or more agency representatives and one or more bargaining unit employees; concerning a grievance, personnel policy, or practice or other general matters affecting working conditions), the union president is correct. The interviews as arranged constitute formal discussions, and the exclusive representative is entitled to advance notice and to be present.

Fact-Gathering Sessions

The agency representative could modify the interviews, create a fact-gathering session, and foreclose the exclusive representative's rights under section 7114(a)(2)(A). The Authority has ruled that when an agency conducts a fact-gathering session, the union's rights under section 7114(a)(2)(A) do not attach.[36] To determine whether a fact-gathering session was held, the Authority will again examine the totality of the facts and circumstances surrounding the discussion.[37] If the interview is not a formal discussion, then it is a fact-gathering session, and the union has no right to attend.

The following modifications would convert the above interviews from a formal discussion to a fact-gathering session: 1) limit the meeting to the employees interviewed and the interviewer (the interviewer can always back brief the other members of his staff, if necessary); 2) conduct the meeting in the employees' shop or in the office of the employees' supervisor; 3) eliminate any formal advance written notice; 4) do not structure the meeting around an agenda; and 5) do not make the witness's attendance at the interview mandatory. These modifications would transform the formal discussion into a fact-gathering session, and the exclusive representative would have no right under section 7114(a)(2)(A) to be present.[38]

Brookhaven Warnings

In a fact-gathering session, bargaining unit employees must be informed that their presence at the interview is not mandatory. Agency representatives must give each employee the *Brookhaven* warning.[39] The requirements of the *Brookhaven* warning are:

1) the agency representative must inform the employee of the purpose of the questioning;

2) the questioning by the representative must not occur in a coercive context (assure the employee that there will be no reprisal if he or she refuses to participate, and obtain the employee's participation voluntarily); and

3) the representative's questioning must not exceed the scope of the legitimate purpose of the inquiry or otherwise interfere with the employee's protected rights.[40]

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[28]Legislative History, *supra* note 26, at 1186.

[29]Customs Service v. National Treasury Employees Union, 29 FLRA No. 54 (1987).

[30]*Id.* at 614.

[31]*Id.*

[32]Nuclear Regulatory Commission v. National Treasury Employees Union, 21 FLRA No. 96 (1986).

[33]*Id.*

[34]*Id.* at 768.

[35]*Id.*

[36]Internal Revenue Service and Brookhaven Service Center v. National Treasury Employees Union, Chapter 99, 9 FLRA No. 132 (1982).

[37]*Id.*

[38]*Id.*

[39]*Id.*

[40]*Id.*

The purpose of the *Brookhaven* warning is to ensure that employees are not subject to coercive questioning concerning the exercise of their protected rights under the Civil Service Reform Act.[41] Section 7102[42] of the act provides that each employee shall have the right to join or assist any labor organization or to refrain from any such activity freely and without fear of penalty or reprisal. Failure of the agency representative to provide the *Brookhaven* warning is not a per se violation.[43] The Authority will determine whether the circumstances surrounding the interview were coercive, instead of simply determining whether the *Brookhaven* assurance was given.[44] Therefore, agency representatives do not have to give the *Brookhaven* warning, but they must ensure that the circumstances surrounding the fact-gathering session are not coercive.

Weingarten

Brookhaven warnings and the right to attend formal discussions are rights belonging to the employee and the union, respectively. Management has an obligation to ensure that each right is protected. In the case of formal discussion, management must give the exclusive representative advance notice and an opportunity to attend. In regard to the *Brookhaven* warning, management must ensure that the circumstances surrounding the interview of a bargaining unit employee are not coercive. In contrast, the *Weingarten* right[45] puts the onus on the employee to invoke his or her rights.

The *Weingarten* right is found in section 7114(a)(2)(B)[46] of the Civil Service Reform Act, which states:

> An exclusive representative of an appropriate unit in an agency shall be given the opportunity to be represented at—
>
> . . . .
>
> (B) any examination of an employee in the unit by a representative of the agency in connection with an investigation if—
>
> the employee reasonably believes that the examination may result in disciplinary action against the employee and the employee requests representation.

The key portions of section 7114(a)(2)(B) are: 1) the employee's belief that disciplinary action can be taken; and 2) the employee's request for union representation. Without these two factors, the employee's rights under section 7114(a)(2)(B) do not attach.[47] If the employee reasonably believes that disciplinary action can be taken and requests union representation, management must either suspend the interview or give the employee an opportunity to be represented by the exclusive representative. Management's only other obligation under section 7114(a)(2)(B) of the Civil Service Reform Act is to inform the employees of their *Weingarten* right once a year.[48]

Conclusion

The rights bestowed on union officials and bargaining unit employees with regard to formal discussions, the *Weingarten* safeguards, or the *Brookhaven* warnings are separate and independent. Agency representatives cannot pick and choose the right they want to apply.[49] The fulfillment of the obligations concerning formal discussion cannot substitute for either the *Brookhaven* warning or the *Weingarten* right.[50] Often these rights will overlap. For instance, an agency representative may hold a formal discussion where management is obligated to give the union advance notice and an opportunity to be present and, at the same time, must ensure that the circumstances surrounding the discussion are not coercive. In addition, if the employee, during the discussion, reasonably believes that disciplinary action can be taken and requests union representation, his rights under section 7114(a)(2)(A) are triggered. Agency representatives must analyze each situation carefully and determine which right applies.

How agency representatives presently interview bargaining unit employees need not change drastically. Agency representatives must be aware of the rights guaranteed by section 7114(a)(2)(A)&(B) and *Brookhaven*. By analyzing the totality of the facts and circumstances surrounding the interview of bargaining unit employees and by being aware of the requirements of each right, agency representatives can easily structure their interviews to avoid violating the rights of the exclusive representatives and bargaining unit employees.

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[41] Department of the Air Force F.E. Warren Air Force Base, Cheyenne, Wyoming v. American Federation of Government Employees, Local 2354, 31 FLRA No. 35 (1988).

[42] 5 U.S.C. § 7102 (1982).

[43] Department of the Air Force F.E. Warren Air Force Base, Cheyenne, Wyoming v. American Federation of Government Employees, Local 2354, 31 FLRA No. 35, at 549 (1988).

[44] *Id.*

[45] Internal Revenue Service and Brookhaven Service Center v. National Treasury Employees Union, Chapter 99, 9 FLRA No. 132 (1982).

[46] 5 U.S.C. § 7114(a)(2)(B) (1982).

[47] *See, e.g.*,, Department of Labor, Employment Standards Administration v. James Brown, 13 FLRA No. 35 (1983); American Federation of Government Employees, Local 2544 v. FLRA, 779 F.2d. 719 (D.C. Cir. 1985).

[48] 5 U.S.C. § 7114 (a)(3) provides: "Each agency shall annually inform its employees of their rights under paragraph (2)(B) of this subsection."

[49] Department of the Air Force F.E. Warren Air Force Base, Cheyenne, Wyoming v. American Federation of Government Employees, Local 2354, 31 FLRA No. 35 (1988).

[50] *Id.* at 545-46.

DAD Notes

Order and Consent

The fourth amendment to the United States Constitution is a safeguard against unreasonable searches and seizures. Generally, searches require the prior authorization (warrant) of a judge or magistrate.[1] In the military context, a commander also has the power to authorize a search.[2] To protect this fourth amendment guarantee, evidence obtained as the result of unlawful searches may be excluded.[3] There are, however, certain exceptions to the warrant requirement; among them is consent.[4] A search will normally be lawful if valid consent is given. Two cases from the Court of Military Appeals have recast fourth amendment analysis in the area of consent searches.

The commander in *United States v. White*[5] was told by an Air Force Office of Special Investigations agent that a "reliable" source had informed him that Airman White had been using drugs. The commander confronted Airman White with the information and truthfully told her that he did not know the source of the information. She was told that if she did not consent to a urinalysis test, he would order it accomplished. The Court of Military Appeals, in an opinion by Judge Cox,[6] relied on *Bumper v. North Carolina*[7] to hold that when the soldier is given no option, the result is mere acquiescence, not consent. The court cited *Bumper* for the proposition that a search cannot "be justified as lawful on the basis of consent when that 'consent' has been given only after the official conducting the search has asserted that he possesses a warrant."[8] The court went on to equate the mere ability on the part of the commander to order a urinalysis with the actual possession of a valid search warrant by a police officer and noted that in "such circumstance, it is not the consent that legitimizes the search, but the warrant." In the *White* case, however, because the consent was involuntary and there was no probable cause to order that a urine sample be provided, the evidence was not admissible.

The Court of Military Appeals recently dealt with a similar issue in *United States v. Simmons*.[9] Airman Simmons was arrested by the District of Columbia police while seated in an automobile in a heavy drug-trafficking area. Cocaine and drug paraphernalia were found in the vehicle. He was told by his commander that he either could consent to a urinalysis or it would be command-directed. The court, in another opinion by Judge Cox, distinguished *White* by stating that in *Simmons* there was adequate probable cause upon which the commander "*could have ordered* the urinalysis."[10]

The search authorization in *Simmons* was fiction. The search order could have been given, but was not. This decision parallels the analysis in *White*, in which the court equated the commander's ability to order a urinalysis with a police officer's possession of a valid search warrant. The implication of *Simmons* and *White* is that the warrant requirement of *Bumper* and Military Rule of Evidence 315 is met, even though no probable cause authorization has been issued by the commander. An incomplete and undefined search authorization exists with the commander. When probable cause appears, the search authorization becomes lawful and complete, even without ever having been articulated.

When challenging the "voluntariness" of a consensual search or seizure in situations similar to *White* and *Simmons*, trial defense counsel must demonstrate that the client's will was overborne or that the consent was mere acquiescence. Trial defense counsel must also be prepared to demonstrate, if possible, the lack of probable cause upon which any order could have been based. CPT W. Renn Gade.

Is the Sentence Appropriate?

Recently, an appellate defense attorney was overheard to say that an adjudged sentence of a dishonorable discharge and confinement for three years seemed harsh for a soldier convicted of one distribution of methamphetamine. Fortunately, the soldier had a pretrial agreement, and the convening authority could only approve a bad-conduct discharge and confinement for fifteen months. Nevertheless, the question lingers whether even the approved sentence was appropriate for this soldier and offense.

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[1] Katz v. United States, 389 U.S. 347 (1967).

[2] Manual for Courts-Martial, United States, 1984, Mil. R. Evid. 315(d)(1) [hereinafter MCM, 1984, and Mil. R. Evid.].

[3] Mapp v. Ohio, 367 U.S. 643 (1961).

[4] Schneckloth v. Bustamonte, 412 U.S. 218 (1973).

[5] 27 M.J. 264 (C.M.A. 1988).

[6] Judge Cox's expansive view of a commander's authority is best detailed in United States v. Morris, 28 M.J. 8 (C.M.A. 1989).

[7] 391 U.S. 543 (1968).

[8] *White*, 27 M.J. at 266 (quoting *Bumper*, 93 S. Ct. at 1791).

[9] 29 M.J. 70 (C.M.A. 1989).

[10] *Id.* at 71 (emphasis added).

The appropriateness of a sentence is determined first at the trial level by the sentencing authority, then by the convening authority or supervisory authority, and finally by the courts of military review.[11] The Court of Military Appeals has expressly declined to evaluate sentence appropriateness, except in cases where the lower court's reassessment of a sentence results in an obvious miscarriage of justice or abuse of discretion.[12] The Court of Military Appeals and the military courts of review have recently been active in examining the role of appellate judges in evaluating sentence appropriateness. Additionally, the court has reviewed the role of trial defense counsel and appellate defense counsel in ensuring an appropriate sentence is approved.[13]

The courts of review assess sentence appropriateness under article 66(c) of the Uniform Code of Military Justice.[14] The courts of review do not have the authority to grant clemency.[15] Evaluation of sentence appropriateness is different from granting clemency. A sentence appropriateness evaluation requires the court to simply "do justice" and ensure an accused gets no more punishment than he or she deserves.[16] Clemency, on the other hand, involves bestowing mercy and treating an accused with less rigor than he deserves.[17]

The Court of Military Appeals has stated that sentence appropriateness should be judged by "individual consideration" of the particular accused "on the basis of the nature and seriousness of the offense and the character of the offender."[18] Despite individual consideration of an accused's sentence, the Court of Military Appeals has recognized a need for "relative uniformity" in sentences for similar offenses. "Relative uniformity," however, does not require comparison of similar cases followed by an arithmetically averaged sentence.[19]

The courts of review can and should draw on their extensive exposure to numerous records of courts-martial from various convening authorities in evaluating whether a sentence is appropriate for a particular soldier on the facts of the particular case.[20] The judges generally are not required to consider sentences adjudged in other cases.[21]

In rare instances, the appropriateness of a sentence can be determined only by comparing the sentences in different cases. Instances requiring comparison of sentences involve closely related cases, such as those of accomplices.[22] Sentences need not be exactly the same in closely related cases, but there must not be inappropriate disparity in the sentences. The courts of review will examine closely the aggravating and mitigating circumstances. The examination will include the accused's role and his comparative culpability.[23] The Army Court of Military Review has recently stated that an accused's plea agreement has no effect on the court's determination of the appropriateness of a sentence.[24]

Counsel at the trial and appellate levels can influence determinations of sentence appropriateness. In *United States v. Baker*[25] the Court of Military Appeals examined whether an appellant was denied the effective assistance of counsel when his appellate defense counsel did not challenge the appropriateness of the sentence before the court of military review. The Court of Military Appeals ultimately found there was not a denial of effective assistance of appellate counsel. Chief Judge Everett, writing for the court, suggested that effective representation at the trial or appellate level includes an awareness of administrative remedies available to clients such as administrative discharge, parole, or discharge review.[26] Appellate defense counsel must focus on the issue of sentence appropriateness, not clemency, and must fashion an argument pertaining to sentence appropriateness from material included in the record.[27]

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[11] *See* MCM, 1984, Rule for Courts-Martial 1002 [hereinafter R.C.M.]; R.C.M. 1107(d); R.C.M. 1203.

[12] United States v. Olinger, 12 M.J. 458, 461 (C.M.A. 1982) (citing United States v. Dukes, 5 M.J. 71, 73 (C.M.A. 1978)).

[13] *See, e.g.*, United States v. Baker, 29 M.J. 126 (C.M.A. 1989); United States v. Tucker, 29 M.J. 915 (A.C.M.R. 1989); United States v. Hardin, 29 M.J. 801 (C.G.C.M.R. 1989); United States v. Jones, 28 M.J. 939 (N.M.C.M.R. 1989).

[14] Uniform Code of Military Justice art. 66(c), 10 U.S.C. § 866(c) (1982) [hereinafter UCMJ], which states:

> In a case referred to it, the Court of Military Review may act only with respect to the findings and sentence as approved by the convening authority. It may affirm only such findings of guilty and the sentence or such part of amount of the sentence, as it finds correct in law and fact and determines, on the basis of the entire record, should be approved. In considering the record, it may weigh the evidence, judge the credibility of witnesses, and determine controverted questions of fact, recognizing that the trial court saw and heard the witnesses.

[15] The authority to grant clemency is placed with other officials. *See* UCMJ art. 60(c)(1); UCMJ art. 71; UCMJ art. 74.

[16] United States v. Healy, 26 M.J. 394, 396 (C.M.A. 1988).

[17] *Id.* at 395.

[18] United States v. Snelling, 14 M.J. 267, 268 (C.M.A. 1982) (quoting United States v. Mamaluy, 27 C.M.R. 176, 180-81 (1959)).

[19] *Olinger*, 12 M.J. at 461.

[20] *See* United States v. Ballard, 20 M.J. 282 (C.M.A. 1985) (Everett, C.J., concurring).

[21] *Ballard*, 20 M.J. at 286.

[22] *Snelling*, 14 M.J. at 267.

[23] *See Tucker*, 29 M.J. at 915.

[24] *Id.*

[25] 28 M.J. 121 (C.M.A. 1989).

[26] *Baker*, 28 M.J. at 122.

[27] *Healy*, 26 M.J. at 394.

Trial defense counsel should develop the record during presentencing to assist the appellate court in its review of sentence appropriateness. Counsel should focus on humanizing the client for the record and supporting the appropriateness of the recommended sentence. The client's unsworn statement can function as the equivalent of a presentence report[28] and can serve as the basis to argue for a particular sentence.

Trial defense counsel are also in the best position to influence the convening authority with respect to clemency via a post-trial brief[29] or by objection to the sentence recommendation of the staff judge advocate.[30] In addition, trial defense counsel should be aware that their post-trial clemency submissions, as part of the record, may bear on the issue of potential for rehabilitation and, therefore, be given consideration on the issue of sentence appropriateness.[31] Trial defense counsel who suggest "excessive sentence" on the appellate representation form as a ground for relief should make an effort to supplement the record with evidence to support the claim and upon which appellate defense counsel can fashion an argument concerning sentence appropriateness. Captain Allen F. Bareford.

Flag Desecration in the Army

Recently, the Defense Appellate Division had the opportunity to consider whether a soldier could be convicted under article 134[32] for desecrating an American flag.[33] The accused in this case spit on a flag in a civilian police station. The flag was draped over a latrine wall and was drying at the time. The accused was intoxicated, and his actions were meant to express his displeasure with the way he had been treated and with the way his life had been for the past year.

The Supreme Court considered the basic issue in *Texas v. Johnson*.[34] The Supreme Court ruled that a conviction under the Texas statute[35] violated Johnson's first amendment rights. Johnson was convicted of burning an American flag at the 1984 Republican National Convention to protest the policies of the Reagan administration and some Dallas-based corporations.[36] Several of the underlying issues before the Supreme Court in *Johnson* are now before the Court of Military Appeals as a result of the Army court's disposition of the case after remand.[37] The issues are: 1) whether the conduct was protected at all by the first amendment; 2) whether the governmental regulation is related to the suppression of free expression; and 3) whether the government had a sufficient interest in suppressing free expression. A unique question before the Court of Military Appeals is whether a rule different from that applicable to the civilian community should apply to the military.

It has long been recognized by the Supreme Court that, although only "speech" is literally protected by the first amendment, conduct may also be protected if it is "sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments."[38] In determining whether conduct will bring the first amendment into play and thus be considered "expressive conduct," the issue is whether "[a]n intent to convey a particularized message was present, and [whether] the likelihood was great that the message would be understood by those who viewed it."[39] In several cases the Supreme Court has recognized the communicative nature of conduct specifically related to the flag,[40] and the Court did so again in *Johnson*.

In *Hadlick* the Court of Military Appeals will have the opportunity to comment upon whether the accused's act of spitting on the flag was expressive conduct. If the court answers that question in the affirmative, the next question will be whether a charge under UCMJ article 134 for desecrating the flag is a suppression of free expression.[41] Just as in *Johnson*, a ruling could be fact-specific and not one reaching the issue of whether the prohibition in general is overbroad.[42] If the Court of Military Appeals agrees that the specification in issue suppressed free expression, the third question to be answered is whether the government had a sufficient interest involved to allow the suppression. Under such circumstances, the test to be applied will require the government to show that the "regulation is necessary to serve a compelling state interest."[43]

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[28] Marvin and Jokinen, *The Pre-sentence Report: Preparing for the Second Half of The Case*, The Army Lawyer, Feb. 1989, at 53.

[29] UCMJ art. 38(c).

[30] *See* United States v. Goode, 1 M.J. 3 (C.M.A. 1975).

[31] *Healy* 26 M.J. at 396; *see* R.C.M. 1105.

[32] UCMJ art. 134.

[33] The Court of Military Appeals identified this issue and remanded the case for consideration by the Army Court of Military Review in United States v. Hadlick, 29 M.J. 280 (C.M.A. 1989) (summary disposition).

[34] 109 S. Ct. 2533 (1989).

[35] Tex. Penal Code Ann. § 42.09 (1989).

[36] 109 S. Ct. at 2535.

[37] In its memorandum opinion on remand in *Hadlick*, the Army Court of Military Review found that the accused's conduct was not protected by the first amendment, but set aside the charge on other grounds. United States v. Hadlick, ACMR 8900080 (A.C.M.R. 30 Nov. 1989) (unpub.). The case is now again before the Court of Military Appeals pursuant to the original order. *See Hadlick*, 29 M.J. at 280.

[38] Spence v. Washington, 418 U.S. 405, 409 (1984).

[39] *Id.* at 410-11.

[40] *See, e.g., Spence*, 418 U.S. 405 (1974) (attaching a peace sign to the flag); West Virginia Board of Education v. Barnette, 319 U.S. 624 (1943) (saluting the flag); Stromberg v. California, 283 U.S. 359 (1931) (displaying a red flag).

[41] In *Hadlick* the government did not charge under clause 3 of article 134. Rather, the charge was under clauses 1 and 2 for conduct to the prejudice of good order and discipline in the armed forces and of a nature to bring discredit upon the armed forces. Thus, it was the specific conduct that the government was attempting to suppress.

[42] *Johnson*, 109 S. Ct at 2538 n.3.

[43] Perry Educational Assn. v. Perry Local Educators Assn., 460 U.S. 37, 45 (1983).

The principal government interest involved in all article 134 offenses is the maintenance of good order and discipline in the armed forces, along with the preservation of the reputation of the armed forces. Under the facts of *Hadlick*, where the accused was in a civilian facility, it is questionable whether the government interest in maintaining good order and discipline in the armed forces was at stake. Thus, the key is whether the government interest in preserving the reputation of the service is compelling enough to prevent the accused, while in a civilian facility, from exercising his rights guaranteed by the first amendment. As charged in the specification in *Hadlick*, the government is attempting to control how servicemembers treat the U.S. flag to prevent them from discrediting the armed forces. The only logical conclusion is that the government is concerned that society will find certain treatment of the flag by soldiers particularly offensive and that society will therefore lose respect for the armed forces. Nevertheless, the Supreme Court stated in *Johnson* that "a bedrock principle underlying the first amendment ... is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[44] The Court went on to say that there is no exception to this principle, even where our flag is involved.[45] The same rule that applies to spoken or written words also applies to expressive, nonverbal conduct "where the [government] regulation of that conduct is related to expression."[46]

Finally, the remaining question is whether a rule different from that applicable to the civilian community should apply to the military. It is well settled that members of the military enjoy the protections granted by the first amendment, even though in certain circumstances there may be a different application of the protection.[47] The Supreme Court has ruled that the reason for the different application of the first amendment protections is "[t]he fundamental necessity for obedience, and the consequent necessity for imposition of discipline ... within the military."[48] Given the facts in *Hadlick*, however, that reasoning does not seem to apply. It is difficult to imagine how spitting on the flag in a civilian latrine facility would undermine discipline in the Army. Furthermore, the government has the burden to show why a rule different from that applicable to the civilian community should apply to the military.[49]

The Army Court of Military Review recently decided this case and, for different reasons, dismissed the charge. The Army court did not adopt the appellant's contention that his conduct was protected by the first amendment as an exercise of free speech. Rather, the Army court found that the record of trial lacked any information that appellant's actions were prejudicial to good order and discipline in the armed forces or were of a nature to bring discredit upon the armed forces.[50] The case is now before the Court of Military Appeals. The views of the Court of Military Appeals concerning the many interesting issues in this case may be made known in the coming months. CPT Gregory A. Gross.

Presence of BZE Not Enough to Establish Subject Matter Jurisdiction Over Reservist

Consider this situation—a reservist in the United States Army receives orders to report for active duty training. He reports for duty and less than 36 hours later is required to submit a urine sample. His sample tests positive for benzoylecognine (BZE).[51] If the Army wanted to prosecute the reservist for wrongful use of cocaine based solely upon the positive urinalysis, would court-martial jurisdiction exist? Recently, the Army Court of Military Review addressed this issue.[52] The court held that the Army had personal jurisdiction over the reservist at the time of trial because of his status on active duty, but lacked subject matter jurisdiction because no proof existed that the reservist used cocaine while actually on active duty. As a result, the court set aside the conviction.

In its opinion, the court explained that *Solorio*[53] does not stand for the proposition that subject matter jurisdiction is coterminous with personal jurisdiction.[54] Thus, the government has the burden of proving beyond a reasonable doubt that the Army has both personal jurisdiction and subject matter jurisdiction. The Army has jurisdiction only over offenses committed by persons who are subject to the Uniform Code of Military Justice *at the time the offense is committed.*[55] This is very important to note because a court-martial may have subject matter jurisdiction over an offense committed by a soldier, yet lack personal jurisdiction because the soldier who committed the crime has subsequently been discharged or released from the service.[56] Likewise, personal jurisdiction may exist

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[44] *Johnson*, 109 S. Ct. at 2544.

[45] *Id.* (citing Street v. New York, 394 U.S. 576 (1969)).

[46] *Johnson*, 109 S. Ct. at 2545.

[47] *See* Parker v. Levy, 417 U.S. 733 (1974); United States v. Priest, 45 C.M.R. 335 (1972); United States v. Ezell, 6 M.J. 307 (C.M.A. 1979).

[48] *Parker*, 417 U.S. at 758.

[49] *See* Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

[50] *Hadlick*, slip op. at 4.

[51] BZE is a metabolite of cocaine. Once cocaine is ingested, the chemical structure of cocaine is broken down into simpler, water-soluble chemical compounds that the human body can more readily excrete.

[52] United States v. Chodara, ACMR 8801244 (A.C.M.R. 3 Jan. 1990).

[53] Solorio v. United States, 483 U.S. 435 (1987), overruled the prior limitations that restricted subject matter jurisdiction of courts-martial to those crimes which have a "service connection" in favor of determining subject matter jurisdiction based upon "the military status of the accused."

[54] *Chodara*, slip op. at 2.

[55] *See Solorio*, 483 U.S. at 451; United States v. Jordan, 29 M.J. 177, 184-85 (C.M.A. 1989).

[56] *See* United States v. Howard, 20 M.J. 353, 354 (C.M.A. 1985).

over an accused because of his service status, but subject matter jurisdiction may not exist if the offense was not committed at a time the accused was in the status of being a member of the armed forces.[57] This distinction between personal and subject matter jurisdiction is extremely important when the accused is a reservist. To ensure that proper court-martial jurisdiction exists, defense counsel must determine if the reservist was subject to the Uniform Code of Military Justice at the time the alleged offense was committed.

Contrary to the government's theory in *Chodara*,[58] the Army court ruled that wrongful use of cocaine is not a continuing offense and that the government must prove the time of use in order to establish subject matter jurisdiction.[59] The court further opined that the mere presence of BZE in appellant's urine did not *per se* establish a violation of UCMJ article 112a.[60]

The Army court's opinion differs from the pre-*Solorio* opinions of the Navy-Marine Corps Court of Military Review in *United States v. Chevrie*,[61] *United States v. Martin*,[62] and *United States v. Pearson*.[63] The Navy-Marine court held that the presence of a level of metabolites sufficient to render a positive urinalysis constituted a "psychological or physiological effect" within the meaning of *Murray*.[64] Thus, service connection necessary for subject matter jurisdiction was established by the mere presence of these chemical compounds. In *Chodara*, however, the Army court has rejected an assertion of jurisdiction based solely upon the presence of a non-controlled substance, i.e., the metabolite. Some distinctions underlying this differing position are that *Chodara* is a post-*Solorio* case and that the metabolite, as opposed to the actual controlled drug, was involved. Also, the Army court may interpret *Murray* as requiring proof of the *effects* of controlled substances as opposed to their mere presence. Without such proof, jurisdiction is lacking over a reservist who used drugs prior to reporting for active duty. Under *Chodara*, subject matter jurisdiction cannot be based solely upon the military status of the reservist at the time he submitted the positive urine sample.

This case is important for defense counsel because it appears that the Army court is returning to what is essentially a pre-*Solorio* service connection requirement for subject matter jurisdiction over reservists. This decision could impact on cases as it appears the Army court will require, at a minimum, evidence of actual physiological or psychological effects of the drug when the reservist commences active duty in order to court-martial him for a violation of UCMJ art. 112a. A mere positive test alone will not satisfy the government's burden of proof, at least where the test reveals only a drug metabolite. CPT Pamela J. Dominisse.

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[57]*See* United States v. Jordan, 29 M.J. at 184-85.

[58]The government's theory of subject matter jurisdiction was premised solely upon the fact that the accused's body had the metabolite BZE in his system during a period of active duty service. *Chodara*, slip op. at 3. The government argued it was a continuing offense for as long as the metabolite was present in the accused's body.

[59]The Army court held that the presence of BZE alone does not establish an offense and the time of ingestion is important as it would determine whether or not the court-martial had jurisdiction over the offense.

[60]UCMJ art. 112a.

[61]United States v. Chevrie, NMCMR 853859 (N.M.C.M.R. 21 Mar. 1986) (unpub.).

[62]United States v. Martin, NMCMR 850374 (N.M.C.M.R. 4 Oct. 1985) (unpub.).

[63]United States v. Pearson, Misc. Dkt. No. 84-10 (N.M.C.M.R. 17 Jan. 1985) (unpub.).

[64]Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983), stands for the proposition that use of psychoactive drugs by a servicemember off base while on extended leave is service connected if the servicemember enters a military installation while subject to any physiological effects of the drug. The court cited United States v. Trottier, 9 M.J. 337, 349 (C.M.A. 1980), for the proposition that "in many instances drugs will enter a military installation in their most lethal form—namely, when they are coursing through the body of the user."

Pretrial Agreement Negotiations: A Defense Perspective

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Introduction

Defense counsel often find themselves in difficult positions when they negotiate pretrial agreements. The cases against their clients are usually very strong.[1] Consequently, defense counsel will usually be eager to get some sort of sentence limitation to control the length of time their clients will spend in jail. The clients may have unrealistic expectations about their defense counsel's ability to obtain pretrial agreements that provide for little or no confinement. On the other hand, trial counsel will invariably want sentence limitations to include long terms of confinement. These conflicting interests and the appellate courts' concerns about overreaching by the government[2] often lead to a great deal of confusion.

A typical pretrial agreement negotiation might sound like this:

> Trial Counsel (TC) (walking into the defense counsel's office): I was wondering if you were going to submit a pretrial agreement in the *Jones* case.
>
> Defense Counsel (DC): Well, I haven't talked to my client yet, but what kind of terms would you be willing to offer if he did plead guilty?
>
> TC: I think we could get the General to buy off on two years of confinement—that is if your client were willing to waive the article 32 investigation and trial by members.
>
> DC: How much could I get without the waivers?
>
> TC: Two-and-a-half years—just like usual. Say, when do you think you could go to trial on this case? We might be able to get the General to go a little lower if you were able to go to trial next week.
>
> DC: Well, I'll have to talk to my client first. Could I get eighteen months if I waived everything and went to trial next Monday?
>
> TC: I think so. But you'll have to get the deal to me this afternoon; the staff judge advocate has an appointment with the General tomorrow morning.

Does this sound familiar? Although this may not be the best way to conduct pretrial agreement negotiations, discussions like these are often the way that pretrial agreements are reached. This article will examine proper and improper methods of negotiating pretrial agreements.

Pretrial Agreement Terms

Plea bargaining is a relatively recent development in military law.[3] When plea bargaining was first established in the military, military courts frequently concerned themselves with the terms of such plea bargains. Although the courts generally allowed the accused and the convening authority to bargain about charges and sentence, they were more reluctant to allow bargaining concerning other terms.[4] The courts were quick to strike down pretrial agreements containing defense promises that waived rights so fundamental that the trial was turned into an "empty ritual."[5] With the promulgation of the 1984 Manual for Courts-Martial,[6] the President set forth the limits of pretrial agreements.[7]

Under the 1984 Manual, there are many terms that the accused may offer to encourage the convening authority to enter into a pretrial agreement. Typically, a pretrial agreement will include an offer to plead guilty to one or more charges and specifications.[8] It usually includes an agreement to enter into a stipulation of fact concerning the charges and specifications to which the accused will plead

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[1] This fact is demonstrated by the high percentage of convictions obtained in courts-martial Armywide. For example, between October and December 1987, 94.4% of all general and special courts-martial resulted in convictions. Clerk of Court Note, The Army Lawyer, May 1988, at 47.

[2] *See, e.g.*, United States v. Jones, 23 M.J. 305 (C.M.A. 1987); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[3] Plea bargaining was initiated in the Army in 1953 when Major General Franklin P. Shar, Acting The Judge Advocate General of the Army, sent a letter to staff judge advocates of major Army commands advising them to encourage pretrial agreements. JAGC 1953/1278, 23 April 1953. The Navy and Air Force began engaging in plea bargaining later. The military practice of adopting plea bargaining was based upon the earlier development of plea bargaining in civilian jurisdictions. *See* Smith, *Waiver of Motions in Pretrial Agreements*, The Army Lawyer, Nov. 1986, at 11.

[4] United States v. Cummings, 38 C.M.R. 174 (C.M.A. 1968).

[5] United States v. Allen, 25 C.M.R. 8, 11 (C.M.A. 1957).

[6] Manual for Courts-Martial, United States, 1984 [hereinafter MCM, 1984].

[7] MCM, 1984, Rule for Courts-Martial 705 [hereinafter R.C.M. 705] allows the accused and the convening authority to enter into pretrial agreements and states which terms and conditions may be included in a pretrial agreement. This provision is new. Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial, United States, 1969, addressed pretrial agreements. *See* MCM, 1984, R.C.M. 705 analysis, app. 21, at A21-35 [hereinafter R.C.M. 705 analysis].

[8] R.C.M. 705(b)(1).

guilty.[9] Additionally, the accused may agree to waive certain procedural requirements, such as an article 32 investigation, trial by members, or the personal appearance of witnesses during the sentencing proceedings.[10] The accused may also agree to waive motions pertaining to substantive legal issues.[11] The accused can agree to testify in the trial of another or to provide restitution.[12] In certain situations, the accused may agree not to engage in further misconduct for a specified period of time.[13]

In return for the accused's promises, the convening authority may agree to refer the charges to a certain level of court-martial,[14] to refer a capital offense as non-capital,[15] to withdraw one or more charges or specifications,[16] or to direct the trial counsel to present no evidence on one or more charges or specifications.[17] The convening authority may also agree to take specified action on the sentence, such as approving no sentence in excess of a specified maximum.[18]

The 1984 Manual specifically prohibits the enforcement of pretrial agreement terms that deprive the accused of certain fundamental rights. The rights listed are the right to counsel, the right to due process, the right to challenge jurisdiction, the right to a speedy trial, the right to complete sentencing proceedings, and the right to appeal.[19] This provision in the 1984 Manual codifies earlier decisions of military courts that prohibited pretrial agreements containing promises to waive fundamental rights.[20]

A concern addressed recently by military courts is the fear that the government may force the accused to place certain terms in his pretrial agreement.[21] The 1984 Manual states that a pretrial agreement term shall not be enforced if the accused did not "freely and voluntarily agree to it."[22] In two recent cases, *United States v. Jones*[23] and *United States v. Zelenski*,[24] the Court of Military Appeals warned that it will strike down pretrial agreements containing terms whose inclusion has been required by local command policy or strongly urged by government representatives.

Stipulations of Fact

The Army Court of Military Review has a longstanding history of sanctioning pretrial agreements that require accused soldiers to stipulate to the factual bases of the offenses to which they plead guilty.[25] Furthermore, most pretrial agreements include terms requiring accuseds to enter into stipulations of fact.[26] The 1984 Manual specifically states that promises to enter into stipulations of fact concerning offenses to which accused soldiers will plead guilty are permissible pretrial agreement terms.[27] Nevertheless, the 1984 Manual does not specifically state what information may be required in the stipulations of fact.[28] Recently, military courts have shown concern over the contents of stipulations of fact and the accused's right to object to the contents at trial.[29]

Stipulations of fact required by pretrial agreements may properly include aggravating circumstances directly relating to or resulting from the offenses to which the accused will plead guilty, because such circumstances are generally admissible during sentencing.[30] The definition of the terms "directly related to or resulting from" an offense, however, is frequently open to dispute.[31]

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[9] R.C.M. 705(c)(2)(A).

[10] R.C.M. 705(c)(2)(E).

[11] United States v. Jones, 23 M.J. 305 (C.M.A. 1987).

[12] R.C.M. 705(c)(2)(B); R.C.M. 705(c)(2)(C).

[13] R.C.M. 705(c)(2)(D).

[14] R.C.M. 705(b)(2)(A).

[15] R.C.M. 705(b)(2)(B).

[16] R.C.M. 705(b)(2)(C).

[17] R.C.M. 705(b)(2)(D).

[18] R.C.M. 705(b)(2)(E).

[19] R.C.M. 705(c)(1)(B).

[20] *See* R.C.M. 705(c)(1)(B) analysis at A21-35.

[21] United States v. Jones, 23 M.J. 305 (C.M.A. 1987); United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[22] R.C.M. 705(c)(1)(A).

[23] 23 M.J. 305 (C.M.A. 1987).

[24] 24 M.J. 1 (C.M.A. 1987).

[25] *See* Cramer, *Attacking Stipulations of Fact Required by Pretrial Agreements*, The Army Lawyer, Feb. 1987, at 43, 45.

[26] *See* Cramer, *supra* note 25.

[27] R.C.M. 705(c)(2)(A).

[28] R.C.M. 705(c)(2)(A) merely states that the accused may offer to enter into a stipulation of fact "concerning offenses to which a plea of guilty or as to which a confessional stipulation will be entered."

[29] *See, e.g.*, United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

[30] R.C.M. 705(c)(2)(A); R.C.M. 1001(b)(4); United States v. Sharper, 17 M.J. 803 (A.C.M.R. 1984).

[31] *See generally* Gonzalez, *A Defense Perspective of Uncharged Misconduct Under R.C.M. 1001(b)(4): What is Directly Related to an Offense*, The Army Lawyer, Sept. 1988, at 37.

The courts have often interpreted these terms liberally, so that much more than the bare elements of the offenses may be admissible during sentencing.[32] For example, in *United States v. Silva*[33] the Court of Military Appeals held that the accused's statements that were made at the time of the offense with which he was charged in which he had admitted his involvement in prior similar misconduct, were "directly related" to the offense and, therefore, admissible in sentencing. In *United States v. Witt*[34] the Army Court of Military Review held that evidence of subsequent misconduct of individuals to whom the accused had distributed drugs was admissible during sentencing at the accused's trial for distribution of drugs. In *Witt* the Army Court of Military Review stated that it would liberally construe the presentencing rules in determining what type of evidence was directly related to an offense.[35] In *United States v Needham*[36] the Court of Military Appeals held that general information on the effects of drugs the accused was charged with distributing, possessing, and using was admissible during sentencing.

Uncharged misconduct that is completely unrelated to the charged offenses is generally not admissible during sentencing.[37] The government will often attempt to include uncharged misconduct in the stipulation of fact so that it can be used during sentencing as evidence in aggravation,[38] for possible impeachment,[39] or to show that the accused has little rehabilitative potential.[40] Once such information has been included in the stipulation of fact, the courts have often held that it is admissible for sentencing purposes because the accused has consented to its admissibility.[41] One defense tactic is to agree to inclusion of such uncharged misconduct in the stipulation of fact and then to object to its inclusion at trial, claiming it is not relevant during sentencing.[42]

The Air Force approved of this defense tactic in *United States v. Keith*.[43] In *Keith* the Air Force Court of Military Review suggested that defense counsel faced with the dilemma of uncharged misconduct in a stipulation of fact should enter into the stipulation and object to the uncharged misconduct at trial.[44]

In *United States v. Taylor*[45] the Army Court of Military Review did not condone such tactics by defense counsel. In *Taylor* the Army Court of Military Review cautioned defense counsel not to include uncharged misconduct or other "unacceptable" information in a stipulation of fact and then object to the inclusion of such information at trial. The Army court stated that trial and defense counsel should fashion an acceptable stipulation of fact before trial, rather than forcing the military judge to become an arbiter in pretrial agreement negotiations. The approach used in *Taylor* was reaffirmed in *United States v. Mullens*.[46]

In *United States v. Glazier*[47] the Court of Military Appeals attempted to resolve the question of whether uncharged misconduct may be included in a stipulation of fact. In *Glazier* the Court of Military Appeals rejected the suggestion in the *Taylor* opinion that the military judge cannot act on objections to matters in the stipulation. The Court of Military Appeals held that otherwise inadmissible uncharged misconduct is admissible if the stipulation of fact includes not only the misconduct, but also a statement that the parties agree to its admissibility.[48]

Defense counsel are frequently warned that they should include only what is absolutely necessary in a stipulation of fact.[49] In fact, however, the stipulation of fact is usually drafted by the trial counsel. Trial counsel may be

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[32] *See, e.g.*, United States v. Silva, 21 M.J. 336 (C.M.A. 1988); United States v. Witt, 21 M.J. 637 (A.C.M.R. 1985).

[33] 21 M.J. 336 (C.M.A. 1986).

[34] 21 M.J. 637 (A.C.M.R. 1985).

[35] *Id.* at 640.

[36] 23 M.J. 383 (C.M.A. 1987).

[37] R.C.M. 1001(b); MCM, 1984, Mil. R. Evid. 404(b) [hereinafter Mil. R. Evid. 404(b)].

[38] R.C.M. 1001(b)(4).

[39] R.C.M. 1001(d).

[40] R.C.M. 1001(b)(5).

[41] United States v. Neil, 25 M.J. 798 (A.C.M.R. 1988).

[42] This was the strategy used by the defense counsel in United States v. Glazier, 26 M.J. 268 (C.M.A. 1988).

[43] 17 M.J. 1078 (A.F.C.M.R. 1984), *pet. denied*, 23 M.J. 238 (C.M.A. 1986).

[44] *Id.* at 1080.

[45] 21 M.J. 1016 (A.C.M.R. 1986).

[46] 24 M.J. 745 (A.C.M.R. 1986).

[47] 26 M.J. 268 (C.M.A. 1988).

[48] *Id.*

[49] Estey, *Stipulations of Fact: Say No More Than Necessary*, The Army Lawyer, Apr. 1988, at 31.

unwilling to delete uncharged misconduct from stipulations because they believe the misconduct will ensure that appropriately severe sentences will be adjudged. Defense counsel are frequently more concerned with the sentence limitation than with the contents of the stipulation of fact, because the charged misconduct is often aggravated enough by itself to result in a substantial sentence.

In many cases, the stipulation of fact is not drafted until after the pretrial agreement has been submitted and approved by the convening authority. The defense counsel is then faced with the choices of accepting the stipulation of fact as the trial counsel has drafted it, including the uncharged misconduct, or having the convening authority withdraw from the agreement.

The aggravating effect of the inclusion of uncharged misconduct in a stipulation of fact may become even greater when the accused begins discussing the stipulation with the military judge during the providence inquiry. Military judges are required to discuss the terms of a pretrial agreement, including the stipulation of fact, with the accused during the providence inquiry.[50] Vague references to uncharged misconduct in the stipulation of fact, which by themselves may be innocuous, may lead to much more aggravated statements by the accused when the military judge starts questioning the accused about the stipulation. This may adversely affect the accused, as the statements the accused makes during the providence inquiry are generally admissible during sentencing.[51] The defense counsel should quickly object if the military judge begins to question the accused about uncharged misconduct during the providence inquiry.[52]

Defense counsel must attempt to keep uncharged misconduct out of the stipulation of fact. If the defense counsel is unable to get the trial counsel to delete the uncharged misconduct, the defense counsel must object to the inclusion of the uncharged misconduct in the stipulation at trial. Such misconduct can be objected to on the basis of relevance[53] or on the basis that its relevance is outweighed by its prejudicial effect.[54]

Waiver of Procedural Rights

Military courts have long condoned the inclusion of waivers of procedural rights in pretrial agreements. The Court of Military Appeals has upheld pretrial agreements that included promises to waive article 32 investigations,[55] personal appearance of character witnesses,[56] and trial by members.[57] The 1984 Manual codified the decisions that permitted pretrial agreements containing waivers of procedural rights.[58] The 1984 Manual specifically allows pretrial agreements to include waivers of the right to an article 32 investigation, the right to trial by members, and the right to obtain personal appearance of witnesses at sentencing proceedings.[59]

In 1987 the Court of Military Appeals expressed concern that the inclusion in a pretrial agreement of a waiver of trial by members may be forced upon the accused by the government. In *United States v. Zelenski*[60] the Court of Military Appeals upheld a pretrial agreement containing such a waiver, notwithstanding the fact that Judge Sullivan, joined by Chief Judge Everett, stated that the court "did not condone the inclusion of such a provision in military plea agreements."[61] Judge Sullivan stated that the court would not invalidate a pretrial agreement solely because it included such a waiver, as long as the waiver was a "freely conceived defense product."[62] Nevertheless, he warned that "service or local command policy which might undermine this legislative intent through the medium of standardized plea agreements will be closely scrutinized."[63] Judge Cox, on the other hand, concurred only in the result in *Zelenski*. Judge Cox believed that the inclusion of such terms in pretrial agreements were proper, even if they were required by service or local command policy.[64]

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[50] R.C.M. 910(f)(4).

[51] United States v. Holt, 27 M.J. 57 (C.M.A. 1988).

[52] *Id.*

[53] R.C.M. 1001(b); Mil. R. Evid. 401.

[54] Mil. R. Evid. 403.

[55] United States v. Schaffer, 12 M.J. 425 (C.M.A. 1982).

[56] United States v. Mills, 12 M.J. 1 (C.M.A. 1981).

[57] United States v. Schmeltz, 1 M.J. 8, 50 C.M.R. 83 (C.M.A. 1975).

[58] *See* R.C.M. 705(c)(2)(E) analysis at A21-36.

[59] R.C.M. 705(c)(2)(E).

[60] 24 M.J. 1 (C.M.A. 1987).

[61] *Id.* at 2.

[62] *Id.* This language originally came from United States v. Schaffer, 12 M.J. 425, 427 (C.M.A. 1982).

[63] 24 M.J. at 2.

[64] Judge Cox referred to his separate opinion in United States v. Jones, 23 M.J. 305, 308 (C.M.A. 1987). That case involved a pretrial agreement which included a waiver of pretrial motions contesting the validity of a search and seizure and pretrial identifications. In that case Judge Sullivan and Chief Judge Everett upheld the pretrial agreement but voiced similar warnings to those contained in United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987). In his separate opinion in *Jones*, Judge Cox stated that he saw "no problem with the [g]overnment's sponsoring, originating, dictating, demanding, etc., specific terms of pretrial agreements." 23 M.J. at 308.

As a practical matter, it may be very difficult to determine whether a promise to waive trial by members was required by service or local command policy.[65] The Army Court of Military Review has stated that the unexplained inclusion of a waiver of trial by members in a majority of pretrial agreements in a given jurisdiction over a significant time period may give rise to an inference that local command policy requires such a provision.[66] Even so, there may be other reasons for the frequent use of such waivers. In some jurisdictions where panels often adjudge harsher sentences than military judges, it may be in the accused's best interest to elect trial by military judge alone when the accused pleads guilty. Consequently, defense counsel may routinely include waivers of trial by members in pretrial agreements simply because they feel they are not giving up anything by doing so.

Waivers of trial by members can be important to the government. It often takes a good deal of time and coordination to provide the accused with a court-martial composed of members. Consequently, the government may be willing to offer the accused terms that are significantly more favorable if he is willing to waive his right to trial by members.

Defense counsel who are contemplating including a waiver of procedural rights in a pretrial agreement should ensure that they know what they will get in return. They should discuss with the trial counsel what terms they can obtain with and without the waiver.

If a defense counsel believes that he is being forced to offer a particular type of waiver in his pretrial agreement, he should document his case. He should keep records of his conversations with the trial counsel and find out whether similar waivers have been required in pretrial agreements approved by the convening authority in the past. He may submit an offer to plead guilty with the agreed upon sentence limitations, but without the waiver. The defense counsel must preserve the issue in any event by raising it with the military judge by way of motion or by saying that part of the agreement did not originate with the defense. Defense counsel must also demand the right they have been required to waive. Defense counsel who successfully show that they have been forced into including a waiver of a procedural right in a pretrial agreement may still have to make a showing of prejudice to obtain relief.[67] Consequently, defense counsel should document any harm their client suffered as a result of the coerced pretrial agreement term.

Waiver of Motions

Military courts have frequently ruled on the propriety of the inclusion in pretrial agreements of waiver of pretrial motions. Military courts have long held that such terms are improper when they involve waivers of fundamental rights, such as the right to due process, because of a concern that this would turn the trial into an "empty ritual."[68] The courts' concern in this area is with ensuring that the accused's plea is provident and that the pretrial agreement is entered into voluntarily.[69]

The courts later turned their attention to the inclusion of *sub rosa* waivers of motions in pretrial agreements. Generally, waivers of motions that were not included in the written agreement were held to be invalid.[70]

The 1984 Manual incorporates prior law by specifically prohibiting pretrial agreements that include waivers of motions involving fundamental rights.[71] The 1984 Manual prohibits pretrial agreement terms that limit the accused's right to challenge jurisdiction or the right to a speedy trial.[72] The 1984 Manual also specifically prohibits pretrial agreement terms that limit the accused's right to counsel or due process.[73]

The 1984 Manual does not specifically permit the inclusion of waivers of other types of motions in pretrial agreements. Since the adoption of the 1984 Manual, however, military courts have often permitted such terms in pretrial agreements. The types of motions that the courts have allowed to be waived include motions pertaining to search and seizure issues,[74] the admissibility of out-of-court statements,[75] out-of-court identifications,[76] and changes of venue.[77]

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[65] *Id.* at 308.

[66] United States v. Ralston, 24 M.J. 709 (A.C.M.R. 1987).

[67] United States v. Bray, 26 M.J. 661 (N.M.C.M.R. 1988).

[68] United States v. Allen; 8 U.S.C.M.A. 504, 25 C.M.R. 8, at 11 (1957); United States v. Cummings, 17 U.S.C.M.A. 376, 38 C.M.R. 174 (1968) (inclusion of a waiver of speedy trial and due process motions in pretrial agreement held improper).

[69] *Id.*; United States v. Holland, 1 M.J. 58 (C.M.A. 1975).

[70] United States v. Troglin, 21 U.S.C.M.A. 183, 44 C.M.R. 237 (1972) (*sub rosa* agreement to waive double jeopardy motion disapproved).

[71] *See* R.C.M. 705(c) analysis at A21-35. The analysis of this rule states, however, that R.C.M. 705(c) was not intended to codify United States v. Holland, 1 M.J. 58 (C.M.A. 1975), to the extent *Holland* may prevent the accused from giving up the right to make any motions at trial. In *Holland* the Court of Military Appeals held that a pretrial agreement term waiving the right to make motions on all matters other than jurisdiction, was invalid.

[72] R.C.M. 705(c)(B).

[73] *Id.*

[74] United States v. Jones, 23 M.J. 305 (C.M.A. 1987).

[75] United States v. Gibson, 27 M.J. 736 (A.C.M.R. 1988).

[76] United States v. Jones, 23 M.J. 305 (C.M.A. 1987).

[77] United States v. Kitts, 23 M.J. 105 (C.M.A. 1986).

Recently, the Court of Military Appeals has expressed concern that pretrial agreement terms waiving the right to raise pretrial motions may be forced upon the accused by the government.[78] This is much the same concern that the Court of Military Appeals has expressed about pretrial agreement terms waiving the right to trial by members.[79] In *United States v. Jones*[80] the Court of Military Appeals upheld a pretrial agreement provision in which the accused waived his right to make motions contesting the legality of searches and seizures and out-of-court identifications. Speaking for the court, Judge Sullivan, joined by Chief Judge Everett, asserted that such a provision was proper so long as it was demonstrated that it "voluntarily originated" with the accused.[81] Concurring in the result, Judge Cox wrote a separate opinion stating that he did not believe that the point of origin of any particular term should be outcome determinative. Judge Cox pointed out that determining the point of origin of pretrial agreement terms would be problematic, and he wrote that with a few exceptions, there was "no problem with the Government's sponsoring, originating, dictating, demanding, etc., specific terms of pretrial agreements."[82]

Defense counsel may be more reluctant to waive pretrial motions than procedural rights. Waivers of procedural rights may have little or no effect on the outcome of the case. When the defense waives the right to make a pretrial motion, however, counsel may be giving up the chance to obtain an acquittal.

With the advent of the conditional plea,[83] defense counsel have reason to be reluctant to waive the right to raise pretrial motions. Ordinarily, if the accused loses a pretrial motion relating to the factual issue of his or her guilt and subsequently pleads guilty, he or she waives the right to assert that issue as ground for reversal on appeal.[84] If the accused enters a conditional plea of guilty, however, he or she does not lose the right to raise the issues in the motion on appeal.[85] The accused can only enter a conditional plea of guilty with the consent of the government and the approval of the military judge.[86] The defense counsel *may* be able to obtain the government's consent in return for some other promise by the accused in the pretrial agreement. Defense counsel who believe they have a good pretrial motion but who still want the protection of a pretrial agreement should discuss the possibility of a conditional plea with the government. Defense counsel who do not wish to include a waiver of motions in a pretrial agreement will often decide not to discuss the waiver with the trial counsel. Instead, defense counsel may choose to avoid discussion of the motion altogether, in the hopes that the trial counsel will not discover the issue the defense plans to raise.

Although many judicial circuits have local rules of court that require the defense to notify the government of motions prior to trial, the pretrial agreement may well be approved prior to that time. Defense counsel who believe they are being forced to waive motions should document their cases in the same manner suggested for the forced waiver of procedural rights. In the case of motions, the defense may not be able to find enough other cases where a similar waiver was required to establish that it is a command policy. Defense counsel must, therefore, discuss the waiver with the trial counsel and submit the offer to plead guilty without the waiver.

Conduct of the Accused

Military courts have consistently indicated their approval of pretrial agreement terms in which accused soldiers agree to conform their conduct to certain standards, as long as the standards are sufficiently definite.[87] The 1984 Manual specifically condones the inclusion in pretrial agreements of terms in which accused soldiers promise to conform their conduct to certain conditions of probation.[88] The 1984 Manual also permits inclusion in pretrial agreements of promises to provide restitution[89] and promises to testify as a witness in the trial of another person.[90]

One issue that the Army Court of Military Review has addressed recently is the enforceability of pretrial agreement terms in which the accused promises to provide restitution, but the accused is indigent. The United States Supreme Court has held it unconstitutional to adjudge an increase in confinement where restitution has not been

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[78] United States v. Jones, 23 M.J. 305 (C.M.A. 1987).

[79] United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[80] 23 M.J. 305 (C.M.A. 1987).

[81] *Id.* at 306.

[82] *Id.* at 308.

[83] R.C.M. 910(a)(2).

[84] R.C.M. 910(j).

[85] United States v. Forbes, 19 M.J. 953 (A.F.C.M.R. 1985); R.C.M. 910 (a) (2).

[86] *Id.*

[87] United States v. Dawson, 10 M.J. 142 (C.M.A. 1981). In *Dawson* a post-trial misconduct clause in a pretrial agreement was held invalid because it was too indefinite. The implication of this case is that such a clause would be valid if it is sufficiently definite.

[88] R.C.M. 705(c)(2)(D).

[89] R.C.M. 705(c)(2)(C).

[90] R.C.M. 705(c)(2)(B).

made by an indigent accused.[91] The Army Court of Military Review has held that when an accused freely agrees to a term in a pretrial agreement providing for restitution, the accused can be penalized for failure to comply with the term, even if he or she is indigent.[92] The Army court distinguished the Supreme Court cases because those cases involved requirements to provide restitution that were forced upon the accused. Restitution clauses in pretrial agreements, on the other hand, are freely agreed to by the accused.

The Army Court of Military Review has also taken note of the fact that the restitution that may be required by a pretrial agreement is often satisfied by involuntary collections from the accused's pay. In a recent case the Army court enforced a pretrial agreement that was rejected by the convening authority solely because it did not contain a promise to make restitution, when the restitution sought was obtained through involuntary collections from the accused's pay.[93] A defense counsel who has been informed that he or she can obtain a more favorable pretrial agreement if it contains a restitution clause should investigate whether the client has already made the desired restitution through involuntary collections.

If a restitution clause does not state the time within which restitution must be made, the courts may imply that the restitution must be made within a reasonable time.[94] To avoid confusion, it may be best to specify when restitution should be completed.

Sometimes the accused may be asked to make restitution for damages caused by misconduct other than that with which the accused will plead guilty to. In a recent case the Court of Military Appeals approved of this practice.[95] The court held that a pretrial agreement may call for restitution for "any loss caused by misconduct related in any way to any offense for which the accused has been charged, regardless of his plea thereto."[96]

When a pretrial agreement includes promises by the accused to act or refrain from acting, the interpretation of the promises often comes into dispute. Generally, pretrial agreement terms not addressed at trial are interpreted in favor of the accused.[97] Therefore, it is often in the accused's interest for such provisions to be as vague as possible. Nevertheless, defense counsel should completely advise their clients of all the possible interpretations of these clauses.

The courts have not addressed the propriety of service or local policies that require inclusion in pretrial agreements of promises requiring action or inaction on the accused's part. The same rules that apply to pretrial agreement terms waiving procedural rights or pretrial motions should apply here.[98] Defense counsel who believe that they are being forced to include post-trial misconduct clauses or similar terms in pretrial agreements should document this and ensure that an appropriate objection is made at trial.

Government Promises

Since the inception of plea bargaining in the military, the courts have allowed the convening authority to agree to take specified action on the charges brought before the court-martial and on the sentence adjudged in consideration for the accused's promises.[99] These judicial decisions were incorporated into the 1984 Manual.[100]

The first promise the convening authority is authorized to make is to refer charges to a certain level of court-martial[101] or to refer a case noncapital.[102] Because summary and special courts-martial have jurisdictional limitations on the maximum punishment authorized,[103] an agreement is equivalent to an agreement to limit the sentence.

The second type of promise the convening authority is allowed to make is to withdraw one or more charges or specifications[104] or to direct the trial counsel not to present evidence on one or more charges or specifications.[105] Generally, a withdrawal of a charge or specification will not bar later reinstitution of the charge or specification.[106]

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[91] Williams v. Illinois, 399 U.S. 235 (1970) (equal protection clause requires statutory ceiling placed on imprisonment be the same for all defendants regardless of economic status); Tate v. Short, 401 U.S. 395 (1971) (denial of equal protection to limit punishment to payment of fine for those able to pay it, but to convert it to imprisonment for those unable to pay).

[92] United States v. Foust, 25 M.J. 647 (A.C.M.R. 1987).

[93] United States v. Jones, 26 M.J. 650 (A.C.M.R. 1988).

[94] United States v. Koopman, 20 M.J. 106 (C.M.A. 1985).

[95] United States v. Olson, 25 M.J. 293 (C.M.A. 1987).

[96] *Id.* at 296.

[97] United States v. Davis, 20 M.J. 903 (A.C.M.R. 1985).

[98] United States v. Jones, 23 M.J. 305 (C.M.A. 1987); United States v. Zelensky, 24 M.J. 1 (C.M.A. 1987).

[99] United States v. Allen, 8 C.M.A. 504, 25 C.M.R. 8 (C.M.A. 1966).

[100] R.C.M. 705(b)(2).

[101] R.C.M. 705(b)(2)(A).

[102] R.C.M. 705(b)(2)(B).

[103] R.C.M. 1301(d); R.C.M. 201(f)(2)(B).

[104] R.C.M. 705(b)(2)(C).

[105] R.C.M. 705(b)(2)(D).

[106] R.C.M. 705(b)(2)(C) discussion; United States v. Cook, 12 M.J. 448 (C.M.A. 1982).

A direction to the trial counsel not to present evidence on a particular charge or specification *may* bar later prosecution for the same offense, as this will generally result in a finding of not guilty.[107]

The third type of promise the convening authority is permitted to make in a pretrial agreement is to take specified action on the sentence adjudged in the court-martial.[108] The convening authority can agree to approve no sentence in excess of a specified maximum, to suspend all or a part of the sentence, to defer confinement, or to mitigate certain forms of punishment to other forms of punishment.[109] Defense counsel can use their imagination in requesting a sentence limitation that is tailored to their client. For example, a promise to suspend a reduction in rank to E-1 may be included in a pretrial agreement, even though the sentence limitation in the agreement includes confinement or a punitive discharge, which ordinarily would require an automatic reduction to E-1.[110]

When a pretrial agreement limits the sentence that the convening authority can approve and the limitation does not mention a particular type of punishment, the convening authority is generally not authorized to approve the type of punishment omitted.[111] Defense counsel should be aware of this rule when drafting a sentence limitation in a pretrial agreement. Unwanted types of punishment should be omitted from the sentence limitation.

Pretrial Agreement Negotiation

The 1984 Manual states that an offer to plead guilty must originate with the accused and defense counsel.[112] Once the accused has initiated negotiations, the convening authority, staff judge advocate, and trial counsel may negotiate the terms and conditions of the pretrial agreement with the defense.[113] After this negotiation, the defense shall submit a written offer, which should include all of the terms of the agreement.[114]

In reality, the initial discussion concerning a pretrial agreement is often initiated by the trial counsel. The trial counsel is typically under much greater pressure than the defense counsel to dispose of cases quickly. The trial counsel will often want to please his commanders by acting swiftly on their cases. He may also be concerned about "processing time"[115] or the tendency of his witness's memories to fade. Often the trial counsel will approach the defense counsel first to ask if the defense counsel plans to submit a pretrial agreement.

Although this procedure may not technically meet the requirements of the 1984 Manual, the result does not adversely affect the accused. The defense counsel typically desires to know whether the government will be willing to enter into a pretrial agreement, even before the accused has expressed an interest in such an agreement, so the defense counsel can inform the accused of all the available options. Even if the accused insists that he or she is innocent, most defense counsel will desire to discuss the possibility of a pretrial agreement with the accused in case the accused later changes his or her story. Whether the pretrial agreement discussions are initiated by the trial counsel or the defense counsel should be irrelevant.

One concern that defense counsel may have in negotiating pretrial agreements is whether their conversations with commanders or the trial counsel can be used against the accused. Generally, under the Military Rules of Evidence, any admissions made during plea discussions cannot be used against the accused.[116] The protections provided for plea discussions under the Military Rules of Evidence are relatively broad. Whether or not the plea discussions are conducted by a defense counsel or by the accused is irrelevant.[117] Plea discussions include not only offers to plead guilty, but also statements made for the purpose of requesting administrative disposition in lieu of court-martial.[118] Furthermore, plea discussions are protected whether they are made with the convening authority, the staff judge advocate, the trial counsel or any other government counsel.[119] In *United States v. Baranas*[120] the Court of Military Appeals held that a letter by an accused to his commanding officer in which the accused admitted his

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[107] R.C.M. 907(b)(2)(C).

[108] R.C.M. 705(b)(2)(E).

[109] R.C.M. 705(c)(2)(E) discussion.

[110] United States v. Cabral, 20 M.J. 269 (C.M.A. 1985).

[111] United States v. Edwards, 20 M.J. 439 (C.M.A. 1985); United States v. Gooden, 23 M.J. 721 (A.C.M.R. 1986).

[112] R.C.M. 705(d)(1).

[113] R.C.M. 705(d)(2).

[114] R.C.M. 705(d)(3).

[115] In the Army "processing time" is the amount of time that elapses from the preferral of charges or imposition of pretrial restraint to the receipt of the completed record of trial by the Clerk of the Army Court of Military Review. Defense delays are generally not included in the calculation of processing time. Processing times are routinely published in the Army Lawyer. *See, e.g.*, Clerk of Court Notes, The Army Lawyer, March 1989, at 28.

[116] Mil. R. Evid. 410(a)(4).

[117] United States v. Barunas, 23 M.J. 71 (C.M.A. 1986).

[118] Mil. R. Evid. 410(b).

[119] Mil. R. Evid. 410(a)(4).

[120] 23 M.J. 71 (C.M.A. 1986).

guilt and requested disposition short of court-martial was protected as a plea discussion.

Although the protections of plea discussions are broad, there are a few unprotected areas about which defense counsel should be concerned. Generally, discussions to obtain immunity are unprotected.[121] Additionally, discussions to protect a third party are not protected.[122]

As mentioned earlier, the Court of Military Appeals has become concerned about the government forcing terms upon the accused during the negotiation process. Pretrial agreement terms must be "freely conceived" by the defense.[123] Unfortunately, the Court of Military Appeals has not set forth any easy test to determine when a pretrial agreement term is a "freely conceived defense product."

As a practical matter, it is nearly impossible to tell which terms originated with the defense and which originated with the government. As Judge Cox pointed out in his concurring opinion in *United States v. Jones*,[124] if defense counsel come to realize that a convening authority will only approve agreements with certain waivers or terms, the defense counsel will place these terms in their pretrial agreements. In this case, it is really the convening authority that has sponsored the terms.

Conclusion

Pretrial agreement negotiation can be extremely difficult for defense counsel. Defense counsel must know when it is in their clients' best interest to discuss issues fully with the government and when it is best to remain silent and avoid suggesting unwanted pretrial agreement terms to the trial counsel. Defense counsel should also be alert to document cases in which they believe they have been forced into waivers of rights by the government. Although the 1984 Manual gives the accused a great deal of latitude in creating pretrial agreement terms, the safeguards established by the courts to ensure these terms are freely conceived by the defense are neither easy to understand nor easy to apply. The best policy, from the standpoint of both the defense and the government, is to keep pretrial agreements simple. The government benefits from this because it lessens the risk of reversal on appeal. The defense benefits because the accused is not forced to waive rights. Most important, perhaps, the accused benefits because it is easier to understand the pretrial agreement.

[121] United States v. Babat, 18 M.J. 316 (C.M.A. 1984).

[122] United States v. Robertson, 582 F.2d 1356 (5th Cir. 1978).

[123] United States v. Zelenski, 24 M.J. 1 (C.M.A. 1987).

[124] 23 M.J. 305 (C.M.A. 1987).

Pretrial Confinement: A Defense Perspective

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Introduction

It is late on a Friday afternoon, and you are finishing your article 15 counseling. The intercom rings. It is the trial counsel, who gleefully informs you that one of your clients is about to be placed in pretrial confinement. Private Jones, already facing substantial confinement time for his entrepreneurial activities involving illegal substances, apparently decided to improve his chances by encouraging witnesses to have memory lapses. When the witnesses reported being threatened, Jones's commander immediately contacted the trial counsel to have Jones placed in pretrial confinement. The trial counsel wants to have Jones escorted to your office immediately for pretrial confinement advice.[1] What advice do you give? What rights does your client have? Does this constitute a sufficient basis to place your client in pretrial confinement? Can you keep Jones out of jail, at least for the moment? Should you even try? Quickly, you search your JAG School notes and the Rules for Courts-Martial.[2] The answers to some of your questions can be easily found in the Manual for Courts-Martial. Others are not so easy to obtain. How can you best help Private Jones or any other client facing pretrial confinement?

[1] Upon being placed in pretrial confinement, a soldier must be informed of certain rights, to include the nature of the offenses, the right to remain silent, the right to counsel, and the procedures by which the confinement will be reviewed. Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 305(e) [hereinafter MCM, 1984, and R.C.M., respectively] The rule does not specify by whom such advice must be provided. In Europe, defense counsel normally provide that advice and complete a form (AE 61) so indicating. The Mannheim confinement facility will not accept a confinee without an AE 61.

[2] R.C.M. 304, 305, 707, and 906 deal with pretrial confinement issues.

Soldiers being placed in pretrial confinement range from the sociopathic serial murderer to the nineteen-year-old soldier who has failed to adapt to taking orders and showing up on time. What these soldiers have in common is a fear of going to jail. What they want is a defense counsel who will keep that from happening. Unless the defense counsel is a miracle worker, most clients will not get what they want. While all defense counsel have some experience in making a silk purse out of a sow's ear, deriving benefits from a client's pretrial confinement situation may seem hopeless.

This article is designed to assist defense counsel in evaluating the chances of securing the client's release; in marshalling tactical and legal arguments to effect the client's release; and, in the case of the majority of soldiers who will not be released, gaining maximum benefit for the defense from the pretrial confinement process.

The Right to Counsel

In order for the defense counsel to help, he or she must be aware that the soldier has been or is being confined. Depending on the circumstances of the case, a defense counsel may become involved prior to actual incarceration or long after the soldier is confined. The defense counsel may be detailed for a limited purpose or as counsel for the entire case. Obviously, the timing and level of involvement impact on the attorney's representation, with earlier and more extensive involvement being better for the client. Unfortunately, being ordered into pretrial confinement does not trigger the right to appointment of counsel.

Rule for Courts-Martial 305(f) permits appointment of counsel, upon the soldier's request, for representation during the magistrate's hearing.[3] Because that hearing may not take place for several days after a soldier is incarcerated, the soldier may spend a significant period of time without the right to see an attorney. This limited right to counsel is based on the Rules for Courts-Martial. There is no statutory or constitutional basis for appointment of counsel for the magistrate's hearing.[4]

Defense counsel have other grounds for asserting a soldier's right to see an attorney prior to actual incarceration. Local rules or military justice regulations may constitute a basis for assignment of consulting counsel.[5] Army Regulation 27-10 expresses a clear preference that a soldier have the opportunity to consult with counsel prior to entry into pretrial confinement.[6] Regulatory preferences, however, fall short of a right to consult with counsel. Violation of this regulatory preference is not likely to result in additional administrative credit or other relief.[7]

If charges are preferred when a soldier is ordered into pretrial confinement, that preferral will serve as a basis for detailing counsel. Preferral of charges is a "critical stage" in the prosecutorial process, entitling an accused to appointment of counsel.[8] Preferral of charges, if not simultaneous with pretrial confinement, will ordinarily follow within a short period of time.[9]

When a soldier, such as the ficticious Private Jones, is represented by counsel, his counsel will normally be notified of his impending incarceration. Prosecutors are likely to be wary of any contact with a soldier known to be represented by counsel.[10]

Even when a soldier entering pretrial confinement sees counsel before confinement, the resulting attorney-client relationship may be a limited one.[11] A soldier in pretrial confinement could easily have seen three different attorneys: one for R.C.M. 305(e) advice; one for representation at the pretrial confinement hearing; and yet a third as detailed counsel for the court-martial. This is particularly true in Europe, where one Trial Defense Service field office is responsible for representing soldiers from throughout Europe at the pretrial confinement hearings.[12]

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[3] R.C.M. 305(i)(2) requires the pretrial confinement decision to be reviewed by a "neutral and detached officer." Army Reg. 27-10, Military Justice, para. 9-3a (16 Jan. 1989) [hereinafter AR 27-10], provides for the use of military magistrates to review pretrial confinement decisions. Paragraph 9-5(b)(1) requires that the military magistrate conduct the R.C.M. hearing.

[4] United States v. Jordan, 29 M.J. 177, 187 (C.M.A. 1989). Judge Cox commented: "We have never held that a review of the propriety of pretrial confinement constitutes commencement of adversary judicial proceedings for Sixth Amendment purposes." *Jordan* considered whether assignment of counsel for purposes of a pretrial confinement hearing rendered invalid a subsequent, warned confession, taken by civilian authorities without notice to that counsel, based on a denial of the accused's sixth amendment rights. The lead opinion of Judge Cox, which was not an opinion of the court, discussed the limited nature of counsel rights under R.C.M. 305, and concluded, for a variety of reasons, that no notice to the accused's military counsel was required.

[5] *See, e.g.*, U. S. Army Europe Reg. 27-10, para. 12b(3), ch. 1 (15 Jan. 1987) [hereinafter USAREUR Reg. 27-10] (counsel must advise the soldier of the R.C.M. 305(e) rights).

[6] AR 27-10, para. 5-13b.

[7] Even though denial of counsel at a critical stage is an error of constitutional dimensions, prejudice is not presumed. United States v. Wattenbarger, 21 M.J. 41 (C.M.A. 1985). Pretrial confinement is not a critical stage in the prosecutorial process. *Jordan*, 29 M.J. at 187; *see also* United States v. Freeman, 24 M.J. 547 (A.C.M.R. 1987) (violation of AR 27-10, para. 5-13b, requiring that counsel be made available within 72 hours of pretrial confinement did not provide any basis for relief).

[8] *Wattenbarger*, 21 M.J. at 43. There is no presumption of prejudice, however, if an accused is denied the right to counsel at this critical stage. *Id.* at 45-46 (citing Coleman v. Alabama, 399 U.S. 1 (1970) (plurality opinion)).

[9] There are exceptions to that general practice. *See, e.g., Wattenbarger*, 21 M.J. at 42-43. Wattenbarger was confined or held in a psychiatric ward for over three months before charges were preferred. The court held that this period before preferral also constituted a critical stage in the prosecutorial process and that the accused was entitled to appointment of counsel on military due process and sixth amendment grounds. *Id.* at 44-45.

[10] *See* United States v. Johnson, 43 C.M.R. 160, 165 (1971): "Once counsel has entered the case, he is in charge of the proceedings, and all dealings with the accused should be through him."

[11] R.C.M. 305(f) authorizes the appointment of defense counsel for the limited purpose of representation at the pretrial confinement hearings. It also limits the accused's right to request individual military counsel at such hearings.

[12] The authors have represented over 300 soldiers in Europe at pretrial confinement hearings since 1987.

A limited attorney-client relationship causes problems for both the accused and the defense counsel. The accused, informed that the defense counsel he is seeing is not really "his" defense counsel, may understandably be reluctant to trust that attorney with his confidences.[13] If later confronted by police agents, the accused may be less likely to invoke his right to counsel.

The facts in *United States v. Jordan*,[14] illustrate this problem. Jordan had been placed in military pretrial confinement and had consulted with a military attorney who later represented him. Immediately after that consultation, Jordan was was taken into custody by civilian authorities, to whom he made several incriminating statements. Judge Cox drew on the limited nature of the consultation relationship and the fact that the police were not agents of the military to conclude that statements taken from an accused without notice to or the presence of his "limited purpose" military defense counsel need not be supressed. Government agents, who neither know nor reasonably should know that a soldier is represented by counsel, may approach that soldier as long as he has not previously invoked his right to counsel.

The technical nature of this issue is illustrated by *United States v. Fassler*.[15] In *Fassler* the Court of Military Appeals discussed the *McOmber*[16] rule, but noted that "regardless of Mil.R.Evid. 305(e) [which is derived from *McOmber*], a suspect who requests counsel during custodial interrogation may not thereafter be interviewed at the initiative of authorities about *any* offense."[17] The court also noted that "[t]he police may interrogate a suspect who has consulted with a lawyer but who has never manifested his desire to communicate with the police except through the offices of counsel."[18]

From the standpoint of the "limited" defense counsel, the relationship is a difficult one as well. The attorney must simultaneously acquire the client's confidence, assess the case sufficiently to determine if release is possible, prepare a case for release that does not compromise a trial strategy that has not yet been determined, and still remain in a limited attorney role. The defense counsel who does well at the pretrial confinement hearing is likely to find that a request for his or her services as individual military counsel will soon follow. The provisions of R.C.M. 305(f) notwithstanding, a limited attorney-client relationship can easily lead to a more general one.[19]

While the nature of the attorney-client relationship can certainly impact on the outcome of a case, the timing of that relationship is even more crucial, for both the pretrial hearing issues as well as trial. The earlier the involvement, the sooner the defense counsel can begin preparation on both fronts.

Assessing the Case

There are some advantages that accrue to the defense when the government sets the pretrial confinement process in motion. By ordering a soldier into pretrial confinement, the government is required to disclose information that might otherwise take the defense some time and effort to acquire. That information is normally contained in the commander's memorandum and attached documents.[20]

While the UCMJ permits any commissioned officer to order a soldier into confinement based upon probable cause, the actual procedures for placing a soldier in pretrial confinement are considerably more complicated.[21] Both Army regulations and local rules require more than a simple order to place a soldier in pretrial confinement.[22] At most installations, the commander's memorandum, although not required by the Rules for Courts-Martial until seventy-two hours after a soldier is placed in pretrial confinement, is prepared prior to the soldier being placed in pretrial confinement. This memorandum summarizes the information that supports the imposition of pretrial

[13]The soldier who is provided with defense counsel for a limited purpose must be so informed. R.C.M. 305(f).

[14]29 M.J. 177 (C.M.A. 1989).

[15]29 M.J. 193 (C.M.A. 1989).

[16]United States v. McOmber, 1 M.J. 380 (C.M.A. 1976). The *McOmber* rule was codified in Military Rule of Evidence 305(e), which provides that government agents may not interrogate a suspect represented by counsel without notice to that counsel.

[17]*Fassler*, 29 M.J. at 196 (emphasis in original) (footnote omitted).

[18]*Id.* at 197 n.4.

[19]One of the factors considered in requests for individual military counsel is the existence of a prior attorney-client relationship. *See* AR 27-10, para. 5-7f(2)(g).

[20]R.C.M. 305(h)(2) requires the unit commander to decide, within 72 hours of the soldier being placed in pretrial confinement, whether pretrial confinement will continue. If the commander approves continued pretrial confinement, his reasons must be reduced to writing. (R.C.M. 305(h)(2)(C)). The rule requires that the memorandum be forwarded to the magistrate (reviewing officer). AR 27-10 includes a pretrial confinement checklist (DA Form 5112-R) that may be used by the commander to prepare the memorandum.

[21]Uniform Code of Military Justice arts. 9-10, 10 U.S.C. §§ 809-810 [hereinafter UCMJ], authorizes commissioned officers to order into arrest or confinement enlisted persons charged with an offense under the UCMJ. UCMJ art. 11 requires the provost marshal to accept such a prisoner when the committing officer furnishes a signed statement as to the charges.

[22]*See, e.g.*, Army Reg. 190-47, Military Police-United States Army Correctional System (1 Nov. 1978) [hereinafter AR 190-47], and local supplements thereto. Before a confinement facility will accept a soldier for pretrial confinement, a number of items, such as required uniforms, personal property inventories, and medical records must be furnished, in addition to the confinement order.

confinement.[23] Statements and other documents supporting the conclusions made in the commander's memorandum are also normally submitted. If these documents are submitted prior to the soldier being confined, the defense counsel who advises the accused should have access to them.[24]

A careful review of all the documents submitted is essential, even when the defense counsel is already familiar with the case. Frequently, additional information is available in the pretrial confinement packet, such as names of witnesses, the client's prior disciplinary record, the command's attitude toward the client, and whether any earlier restraint was imposed. The defense counsel should review the packet with respect to both the decision to confine and the case's likely ultimate disposition. If possible, obtain a copy of all the information contained in the packet. One of the few defense advantages in pretrial confinement is this opportunity for early discovery.

The information contained in the packet should be shown to the accused and thoroughly discussed. Information the accused disagrees with should be identified early. For example, Private Jones may tell you he was not in the area when the witnesses claim he threatened them. By checking out your client's alibi early, you are in a better position to evaluate its strength. If his alibi will stand up in court, you and he can then decide whether it should be saved for trial or disclosed at the pretrial confinement hearing to secure his release. Similarly, exploring the conditions under which a soldier was held prior to being ordered into pretrial confinement may bolster an argument that his continued confinement is not required. A soldier may be able to provide you the names of people who saw him turn himself in from AWOL, thus setting the stage for the contention that he is no longer a flight risk.

Query each client about the nature and duration of any prior restraint. This is particularly important in the case of a soldier charged with a serious offense. Police agencies, recognizing that an accused is much less likely to talk to them after having received advice of counsel, may delay releasing an accused to his unit for pretrial confinement until after they have repeatedly interrogated him. In the meantime, the soldier is held in the "D" cell at the Military Police Station, under armed guard at the unit, or in other functional equivalents of pretrial confinement. Determining the actual date of inception of pretrial confinement is necessary for proper sentence credit or for resolving any speedy trial issues. Further, an astute defense counsel may be able to use the conditions of the restriction to show that any statements made were not voluntary. The fact that lesser means of restraint were used successfully may demonstrate that pretrial confinement is not necessary.

The initial interview with a client facing pretrial confinement is an excellent time to develop the rapport necessary for a good attorney-client relationship. Taking the time to alleviate any unnecessary fears is essential. Recognizing that the vast majority of clients who are ordered into pretrial confinement are indeed confined and remain confined until trial, an effective defense counsel must find out what the conditions of pretrial confinement actually are, both to prepare the client to face them and to emphasize the positive aspects of pretrial confinement. Simple handouts are an effective way of explaining what to expect.

Once the defense counsel has examined the accompanying paperwork and discussed the case with the client, the next step is to determine the likelihood of obtaining release.

Strategies for Release

The Preemptive Strike

Depending on the jurisdiction, the nature of the defense counsel's relationship with the government and the chain of command, and the facts of the individual case, it may be possible to keep your client out of pretrial confinement. In a case where the primary rationale for pretrial confinement stems from the client's failure to adapt to the military, the defense counsel should contact the chain of command and determine the exact reasons why they want the soldier confined. Offer your assistance by having a heart-to-heart talk with the soldier about the impending pretrial confinement and how he must modify his behavior to avoid it. Talk to the prosecutor about speedy trial issues, the reduced likelihood of your client's cooperation in companion cases, or any other factor that may cause him to work with you to convince the chain of command that pretrial confinement is not the answer to their concerns.

Where the staff judge advocate must personally approve pretrial confinement, a direct appeal to him or her may be effective. Many staff judge advocates view themselves as guardians of the fairness of the judicial system, not as the "chief prosecutor." At many CONUS installations, pretrial confinees are shipped some distance away. Their shipment and return for trial preparation and trial will result in some expense to the government, as the local command must pay those costs. Fiscal arguments may be effective when others are not. Obviously these arguments will not work in every case, but the preemptive strike is occasionally successful.

Contesting the Decision to Confine

If you are unable to convince the government that pretrial confinement is not appropriate and your client wants to fight the pretrial confinement, you must attack the legal or factual basis for confinement. The first step is to evaluate the government's evidence supporting the need for pretrial confinement. A great deal of the information a

[23] R.C.M. 305(h)(2)(C). The commander's personal appearance at the pretrial confinement hearing may be considered an adequate substitute. United States v. Walker, 26 M.J. 886 (A.F.C.M.R. 1988), *pet. denied*, 27 M.J. 464 (C.M.A. 1989).

[24] *See* R.C.M. 305(i) analysis, app. 21, at A21-16, 17 [hereinafter R.C.M. 305 analysis]. The analysis reflects the intent of the drafters that the defense have access to all information presented to the reviewing officer. USAREUR Reg. 27-10, para. 12b, requires defense counsel be given a copy of the evidence supporting the probable cause determination.

defense counsel can use to represent a client during the pretrial confinement process is contained in the pretrial confinement packet, particularly the commander's memorandum.

If the documents are not available prior to the actual confinement, they must be available for the magistrate's review,[25] which normally takes place within seven days of the client's placement in pretrial confinement.[26] A copy of the commander's memorandum and any allied papers normally can be obtained from the commander or the trial counsel prior to the magistrate's review.

If the accused's detailed counsel is not the same attorney who will be representing the accused at the magistrate's hearing, close coordination between the two attorneys is essential for the effective representation of the client. The trial attorney should discuss the case with the attorney for the magistrate's hearing, if only to avoid disclosures of defenses or other matters that, for tactical reasons, should be reserved for trial. The trial attorney is likely to have a better understanding of the factual basis for pretrial confinement and of what information is available to challenge the confinement decision.

After reviewing the information obtained from the government, the next step is to evaluate the information in the light of the legal criteria for pretrial confinement. In order to hold a soldier in pretrial confinement, the government must first show that there is probable cause to believe that the client committed a crime.[27] The government must further demonstrate that pretrial confinement is necessary because it is foreseeable that the soldier will not appear at trial or will engage in serious criminal misconduct.[28] Finally, the government must show that less severe forms of restraint are inadequate.[29]

An examination of the government's information will quickly reveal whether the government has probable cause to believe that the client committed a crime. The government rarely has a problem meeting the probable cause requirement. Where the government has failed to submit documents supporting the statements in the commander's memorandum, however, defense counsel should be prepared to argue that the probable cause standard has not been met. Without any documents or statements to support the commander's conclusions, there is no way to judge the basis for or accuracy of those conclusions.

A commander's memorandum that does not include supporting documents can be compared to an affidavit supporting a request for a search warrant that merely states that fruits of a crime are to be found at a particular place. That statement, standing alone, is not likely to justify issuance of a search authorization. A more particularized statement of information that gives rise to probable cause is required for a search authorization. Defense counsel should contend that a similar standard applies to the determination that probable cause exists to confine.

R.C.M. 305(h)(2)(C) indicates that the commander's memorandum may incorporate by reference other documents, such as police reports or official records. Those reports must then be made available to the magistrate and the defense. If such documents are not attached, defense counsel should note that for argument at the magistrate's hearing.

The commander's memorandum rarely addresses potential defenses. Disclosure of the underlying documents may, however, provide such information.

After determining whether the government has met the probable cause requirement, the next step is to identify the government's theory or theories of confinement. Most often the commander's memorandum will state, in rote fashion, that the soldier is "a flight risk" or that it is "foreseeable that the soldier will engage in serious criminal misconduct" if he is not held in pretrial confinement.

The government will normally argue that a soldier is a flight risk when there is a history of such offenses or when the charges include absence without leave or desertion. In evaluating the government's argument, defense counsel should determine whether the soldier returned to military control voluntarily or was apprehended. If the soldier returned voluntarily to military control, the defense should argue that he is no longer a flight risk.

Defense counsel should also pay close attention when the government argues that the client is a flight risk only because he is charged with serious crimes for which he could receive a long sentence. The seriousness of the charges, standing alone, is not enough to justify the imposition of pretrial confinement.[30] Counsel must determine how the offense was discovered, whether any efforts were made to conceal the crime, and whether the soldier made any attempt to flee after commission of the offense. How did the client get to the police station—under his own power or handcuffed in an MP sedan? If the opportunity to flee existed and the client did not take advantage of it, that fact can be presented as evidence that he is not a flight risk.

The definition of what constitutes serious criminal misconduct is very broad. Serious criminal misconduct includes injury to others; intimidation of witnesses; obstruction of justice; and other offenses that pose a serious threat to the safety of the community or to the effectiveness, morale, discipline, readiness, or safety of

[25]R.C.M. 305(i).

[26]R.C.M. 305(i)(1). For good cause, the limit for completion of the initial pretrial confinement hearing can be extended to ten days. R.C.M. 305(i)(4).

[27]R.C.M. 305(h)(2)(B)(i) and (ii).

[28]R.C.M. 305(h)(2)(B)(iii).

[29]R.C.M. 305(h)(2)(B)(iv).

[30]United States v. Heard, 3 M.J. 14, 20 (C.M.A. 1977). *See also* United States v. Rios, 24 M.J. 809 (A.F.C.M.R. 1987).

the command.[31] The broad definition of serious criminal misconduct allows the government to make a colorable claim for pretrial confinement in the majority of cases. Almost all crimes can pose a threat to the safety of the community or to the effectiveness, morale, discipline or readiness of the command.

The number of cases that meet the Rule for Courts-Martial requirement of a "serious threat" should be much more limited. Defense counsel should always remember that pretrial release is the norm.[32] Soldiers may only be held in pretrial confinement in extraordinary circumstances. The fact that a soldier is uncooperative and a "pain in the neck" or that the unit is inconvenienced is not enough to justify pretrial confinement.[33] In determining whether the client is a serious threat, defense counsel need to carefully examine the client's past disciplinary history, the circumstances surrounding the current charges, and the existence of any substance abuse or psychological problems.

Check the file carefully to determine if there is any support for a claim that the client constitutes a serious threat because he has a substance abuse or psychological problem. These arguments are often based on the subjective opinion of the commander and are not supported by any professional medical evidence. When there is no evidence that the command has done anything about these problems, such as referral to a mental hygiene clinic or to an alcohol or drug treatment program, defense counsel can argue that such "problems" have not been proven and they are being used as a smokescreen to keep the soldier confined.

The third step in evaluating the government's pretrial confinement case is to determine why the commander believes that lesser means of restraint are not adequate to maintain control over the soldier. This is the most promising area for obtaining release. Keep in mind that commanders are not required to try lesser forms of restraint before placing a soldier in pretrial confinement.[34] Where no lesser forms of restraint have been attempted, however, defense counsel can argue that restriction would be sufficient in all but the most egregious cases.

When lesser forms of restraint have been attempted, defense counsel need to determine the conditions of the restraint and the results of these attempts. If no problems have been encountered while the client was under a lesser form of restraint, that is strong evidence that lesser means of restraint are adequate. Pretrial confinees are often placed on restriction until all of the paperwork for pretrial confinement is gathered and completed. This may take several days. If there were no disciplinary problems or attempts to break the conditions of restraint, then defense counsel can argue that pretrial confinement was unnecessary. Where severe restraint was imposed, then temporarily lifted (for example, during a field exercise), followed by the imposition of pretrial confinement, the confinement is not only unnecessary, it is arguably illegal.[35]

Marshalling Arguments for Release

After assessing the government's evidence and arguments and acquiring the necessary information from the client, the next step is to prepare the defense arguments for release of the client. While the burden of proof remains with the government,[36] the defense will nearly always be required to present arguments and evidence justifying release.

What to argue and what information to present will vary greatly depending on the facts and strategy considerations of each case. The structure of arguments for release, however, should center around the legal criteria for imposing pretrial confinement. Defense counsel should emphasize any evidence that tends to weaken the charges, that undermines the government's theory of confinement, or that shows that lesser means of restraint are adequate.

Evidence of extenuating circumstances should not be overlooked in trying to lessen the severity of the charged offenses. For example, in the case of a soldier charged with stabbing his wife's lover, the defense emphasized, using only the evidence provided by the government, that the accused had found his wife in her boyfriend's barracks room, that he was unarmed, and that his wife had stabbed him twice with her knife. He removed the knife from his thigh and used it to attack her lover. There was obviously probable cause to believe the accused had committed a serious and violent offense, but given the circumstances, the magistrate found he was not a danger to the community. He was released.[37]

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[31] R.C.M. 305(h)(2)(B).

[32] *Heard*, 3 M.J. at 20. *See also* para. 5-13a, AR 27-10.

[33] *Heard*, 3 M.J. at 20.

[34] United States v. Otero, 5 M.J. 781 (A.C.M.R. 1978). R.C.M. 305(h)(2)(B)(iv) requires the commander to find that lesser means of restraint are inadequate.

[35] *See* R.C.M. 305(l). To establish that the confinement was illegal, the defense must show that the earlier restraint was tantamount to confinement and that there were no problems justifying pretrial confinement after the restriction was lifted.

[36] R.C.M. 305(i)(3)(C).

[37] This case and the two that follow are taken from pretrial confinement cases handled by the authors.

A second example is illustrative of undermining the government's theory for confinement. A soldier was charged with the rape of another soldier's wife. A second attack on the same woman a month later was the basis for pretrial confinement. The documents supporting pretrial confinement cast doubt as to the first offense: the victim's statement reflected she had received a telephone call from her husband during the "attack," but had not told him anything about the accused's presence in the room. The second attack allegedly was with a knife. While the photos of the victim's injuries showed a number of small cuts, they were superficial and indicative of self-infliction, not a knife attack. The soldier was released based on lack of danger to the victim.

The third method of attacking the government's case will usually require information from sources other than the commander's memorandum. To show that lesser means of restraint are adequate, the defense must usually show that they have been used successfully in the case. A good tip that the client has been under some lesser means of restraint is a comparison of the date the soldier entered into pretrial confinement and the date of apprehension, as reflected in rights warnings or elsewhere in the commander's memorandum. For example, in one case the commander's memorandum reflected that the soldier was apprehended after a two-week absence, but was not placed in pretrial confinement for three days after his apprehension and release to the unit. The soldier said that he was indeed apprehended, but only after he called the military police telling them where he was and that he was AWOL. Further, he had been held at the unit for the three days after his apprehension and had not attempted to flee. The soldier's story was confirmed by his commander. He was released.

In examining the charge sheet and the commander's memorandum in each of these cases, it would have been easy to conclude that release was not possible. The offenses supported a reasonable conclusion that the soldier was a flight risk or presented a danger to the community. By focusing the defense attack on the criteria for confinement, the defense was able to secure the release of each soldier with relatively little effort.

In addition to attacking the government's case, it is also helpful to present reasons why it is necessary for the client to be released. These reasons might include unusual family needs or the need to help defense counsel prepare for trial. Evidence showing the client's good military record and his ties to the community may also be presented.

The Hearing

Within seven days after imposition of pretrial confinement, a military magistrate must review the government's decision to place the soldier in confinement.[38] This section will focus on problems encountered at the magistrate hearing.

Who conducts the hearing should be a matter of interest for defense counsel. The military magistrate may be a military judge or a part-time military magistrate.[39] While nominees for part-time magistrate positions may not be involved in prosecution functions and must be mature,[40] they are usually assigned to the local staff judge advocate's office. Defense counsel should not overlook the possibility that the magistrate will feel pressure, real or perceived, to make a decision that will be favorably received by the staff judge advocate and the command. This is particularly true when the hearing is conducted at the military installation where the soldier is assigned, rather than at the confinement facility.

There is no easy answer to this problem. In individual cases where the defense counsel believes confinement was improperly continued, the remedy is to appeal to the military judge assigned to the case.[41] If a pattern can be ascertained, the defense should contact the supervisory military judge with those concerns.[42] While the potential for a problem is always present, to the author's knowledge no actual problems have been encountered.

Another area of concern involves the right to counsel. The accused is not entitled to individual military counsel for this hearing.[43] Civilian counsel may be present.[44] Whether the soldier can insist upon the presence of his detailed defense counsel is an open question.

If Private Jones insists that you represent him at the hearing, is he entitled to your presence, even though the hearing will take place at a confinement facility some distance away? While R.C.M. 305(f) permits the detail of counsel for the limited purpose of the magistrate's hearing, it does not mandate acceptance of that counsel. Even though Private Jones has no right to request individual military counsel at the hearing, the rule does not address a request for counsel already detailed to represent Private Jones. If the sixth amendment right to counsel has already attached, such as through preferral of charges, and an attorney-client relationship has been formed, a strong argument can be made that specially detailed counsel is not an adequate substitute.

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[38] *See supra* note 3.

[39] AR 27-10, para. 9-2b, governs the appointment of part-time military magistrates.

[40] *Id.*

[41] Appeals of the magistrate's decision are governed by R.C.M. 305(j) and are discussed *infra*.

[42] AR 27-10, para. 9-1g, provides that military magistrates who are not military judges will be supervised by a member of the U.S. Army Trial Judiciary.

[43] R.C.M. 305(f).

[44] R.C.M. 305 does not specifically provide for the presence of civilian counsel at this hearing. Entitlement to civilian counsel may be inferred, based on the R.C.M. 305(e) advice, which includes the right to retain civilian counsel, and R.C.M. 305(i)(3)(A), which authorizes the presence of the "prisoner's counsel" at the magistrate's hearing.

While each magistrate handles the mechanics of the hearing differently, certain procedures should be common to every hearing. The hearings are informal in nature, and the rules of evidence do not apply.[45] The government must only show that it has met the requirements for pretrial confinement by a preponderance of evidence.[46] The magistrate's decision is ordinarily announced immediately after a review of the evidence presented and is then formalized in a written memorandum.[47]

At a minimum, the magistrate must review the commander's memorandum.[48] If a government representative is present, he or she may make a statement.[49] Whether that statement is made before or after presentation of the defense case is determined by the magistrate.

The soldier and his counsel have the right to be present at the initial review, if practicable.[50] What is considered practicable is not defined. Defense counsel should strongly object any time the review has been conducted without the presence of the accused and counsel.

At some point after the magistrate has reviewed the commander's memorandum and any supporting documents, the defense has an opportunity to make a presentation. This may include the submission of additional written materials or a statement by the accused or counsel.[51] Rule for Courts-Martial 305(i) does not include provisions for evidence to be presented in other than written form.[52]

The client's statement is a two-edged sword. A well thought out statement from the client is often very effective. A promise to obey all orders and the terms of any restriction imposed by the commander can also be helpful. Defense counsel must warn clients, however, that anything they say to the magistrate may be used against them during their trial. If the client desires to make a statement, defense counsel should carefully review the content of the statement before it is made. Statements from clients regarding the facts of their case should generally be avoided if possible. Most clients find it very difficult to refrain from making incriminating statements once they start talking. To avoid problems, the attorney should present any information pertaining to the facts of the case in some other manner.

While R.C.M. 305(i) would seem to bar consideration of evidence not presented in written form, there are some circumstances where obtaining written statements is simply not practicable. When the soldier is confined at some distance from the available witnesses and his counsel for representation, the defense counsel at the hearing may not be able to present favorable defense evidence in writing. Under these circumstances, a telephone conversation between the witnesses and the magistrate is an alternative. Keep in mind, however, that there will be no record, other than that kept by the magistrate, of what witnesses had to say.[53] If information is presented orally, the defense counsel should either request that the magistrate include a summary of that evidence in the memorandum or have the witness write down what was said and present it to the magistrate at a later time. If the magistrate is reluctant to consider evidence presented orally, the defense can request a delay in the hearing for good cause.[54] If the government representative has presented information orally, the defense counsel can argue that the defense should have a similar right.

While there is no prohibition on ex parte proceedings by a military magistrate,[55] the defense must be notified of the evidence so obtained and must be given an opportunity to respond.[56] Nonetheless, defense counsel should register strong objections anytime proceedings are held outside the presence of the accused and counsel. Only rarely can the government show a cogent reason the accused and counsel cannot hear the evidence adduced.

One major problem with the magistrate's hearing is the limited nature of the "record." The magistrate must set forth his factual findings and conclusions in a written memorandum. That memorandum, together with all documents considered, must be maintained by the magistrate and furnished to the defense or government upon

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[45]R.C.M. 305(i)(3)(B). The rules governing privileges and confessions do apply, however.

[46]R.C.M. 305(i)(3)(C).

[47]R.C.M. 305(i)(6). The memorandum and all other matters considered should be obtained by any defense counsel anticipating a pretrial motion on the issue of confinement.

[48]R.C.M. 305(i)(3)(A).

[49]*Id.*

[50]*Id. See also* United States v. Duke, 23 M.J. 710 (A.F.C.M.R. 1986); United States v. Butler, 23 M.J. 702 (A.F.C.M.R. 1986), *pet. denied*, 24 M.J. 56 (C.M.A. 1987) (holding that it was error not to delay the hearing until the defense counsel could be present).

[51]*Id.*

[52]The discussion to R.C.M. 305(i) indicates that the restriction on considering other than written materials is to "facilitate the promptness of the proceeding" and to ensure that a record is available of the matters considered.

[53]R.C.M. 305(i)(6) requires the magistrate to keep copies of all documents considered, but there is no requirement that information presented orally be reduced to writing.

[54]R.C.M. 305(i)(4) permits the magistrate to extend the seven-day period for the initial review of the confinement decision to ten days for "good cause."

[55]United States v. Bell, 25 M.J. 676 (A.C.M.R. 1987), *pet. denied*, 27 M.J. 161 (C.M.A. 1988).

[56]United States v. Malia, 6 M.J. 65 (C.M.A. 1978).

request.[57] Should counsel later wish to challenge the decision of the magistrate, the record of what was presented and considered may be lacking. Particularly in a review for abuse of discretion, this may work to the disadvantage of the accused.[58]

It is certainly to the defense's advantage to have available for the magistrate's review pertinent provisions of the Rules for Courts-Martial and any case law upon which the defense intends to rely. While most military magistrates are familiar with the rules governing pretrial confinement, refreshing their recollection about recent court decisions and explaining how they apply to the present facts may well result in the client's release.

Prepare the client for the very real probability that the magistrate will not order release. Give the client a realistic estimate of the chances of release. Remember that for the client, the magistrate's hearing is the first test of your abilities as a lawyer and is a critical stage in acquiring the client's trust and confidence.

If the soldier has already entered pretrial confinement at the time of the magistrate's hearing, some of the initial fear of what can or will happen to him in confinement has already subsided. If the chances of obtaining release are not good, discuss some of the advantages of remaining in pretrial confinement. It is a sad commentary on the state of some military units that a significant number of the soldiers in pretrial confinement at the Mannheim, Germany, confinement facility do not want to be released to their units.[59] If the client feels that remaining in confinement is in his best interests, it probably is.

Make certain that the client understands that the magistrate's decision is not final and that there are alternative means of obtaining release. Some soldiers have a tendency to "burn bridges" once they feel that they are in jail permanently.

Further Review of Confinement Decisions

A soldier can be released from pretrial confinement by his or her commander; the commander of the installation on which the confinement facility is located; the military magistrate; or, after charges have been referred, the military judge detailed to the case.[60] While reconsideration by the magistrate or a pretrial motion before the military judge are the most likely means of obtaining release, defense counsel may still want to consider appealing to commanders.

Once a soldier has been placed in pretrial confinement, it is difficult to convince a commander to release him. Commanders have very little incentive to reassume responsibility for a soldier once that soldier is formally placed in pretrial confinement. Commanders will generally defer to the decisions of the military magistrate after responsibility for controlling the soldier has been transferred to the confinement facility. There are some circumstances where an appeal to the commander should be made. When a soldier has a special skill needed by the command, when the chain of command does not believe strongly in the soldier's guilt, or when the reason for placing the soldier in pretrial confinement no longer exists, an appeal to the commander may be successful. Be prepared to show the commander R.C.M. 305(g), which gives a commander the authority to order release. It is essential that counsel ensure that no local regulations have withdrawn that authority.

A request for reconsideration by the magistrate is probably the most likely method for obtaining release.[61] During the original hearing, the magistrate may indicate that there are certain weaknesses in the case that can be exploited by the defense counsel. Whenever significant information that has not previously been considered is obtained, defense counsel can request that the military magistrate reconsider his or her decision in the light of the new information. Military magistrates are generally liberal in granting reconsideration hearings.[62]

If the client is still in pretrial confinement when the charges have been referred, then a motion for the client's release can be made to the military judge assigned to the case[63] during an article 39a session.[64] The military judge may order release in three circumstances: abuse of discretion by the magistrate; when there has been no review by a military magistrate and the information presented to the judge does not justify continued confinement; or when information not presented to the military magistrate establishes that the soldier should be released.[65]

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[57] R.C.M. 305(i)(6)

[58] R.C.M. 305(j) sets forth the standards for review of a magistrate's decision by the military judge. Review is obtained by a motion for appropriate relief. The burden of proof is upon the moving party. R.C.M. 905(c)(2)(A).

[59] Approximately one-fifth of the soldiers the authors represented at pretrial confinement hearings elect not to contest the decision to confine, commenting that the confinement facility is better than being in their units.

[60] R.C.M. 305(g).

[61] R.C.M. 305(i)(7) authorizes reconsideration of continued confinement.

[62] In *Butler*, 23 M.J. at 704-05, the Air Force court found error in the magistrate's refusal to reconsider his decision. The only significant new "information" was the presence of the accused's counsel.

[63] The military magistrate does not lose the authority to order release, even though the case has been referred to trial. *See* R.C.M. 305(g). While the military judge acquires authority over the case at referral, nothing in the rule indicates that the magistrate (or the commander) loses the ability to order release by virtue of referral.

[64] R.C.M. 906(b)(8).

[65] R.C.M. 305(j)(1).

While the military judge cannot conduct a de novo review of the decision to confine,[66] defense counsel should not hesitate to move to obtain the release of a client. It is almost always possible for the defense counsel to present something that has not been previously presented to the military magistrate. For example, the fact that a soldier has been arraigned and can therefore be tried even if he does flee is new information. Another example of new information would be evidence of the client's good behavior while in pretrial confinement. During the initial pretrial confinement hearing, the soldier is usually still in administrative segregation and not in the general pretrial prison population. Guards are often reluctant to offer opinions about good behavior until the prisoner can be observed in the general population. Guards should not be overlooked as the source of favorable information. While they may be reluctant to testify, the reports and records they keep on prisoners may be useful in demonstrating good behavior.

Most military judges will take a close look at the evidence and arguments and make up their own minds as to whether pretrial confinement is necessary.[67] Military judges may also be more receptive to a defense argument that the client's release is necessary for the adequate preparation of the defense case, particularly when facts are complex, the defense counsel is located a long distance from the confinement facility, and the requirement for confinement is slight.

In exceptional cases, an extraordinary writ to the appellate courts may secure release of a client from pretrial confinement.[68] While such cases are rare, counsel should keep in mind that some of the court decisions dealing with the pretrial confinement process are the product of an extraordinary writ.

Preparing the Client to Remain in Pretrial Confinement

Even the most effective defense counsel will be unable to secure the release of every client ordered into pretrial confinement. While most clients are not likely to be pleased by the news that the magistrate has or will order their pretrial confinement continued, there are some advantages accruing to the defense and the accused by continued pretrial confinement. Discussing these advantages with the client who is not likely to be released is essential in encouraging the client to maintain a positive attitude in pretrial confinement. The assessment of confinement facility cadre is of critical importance in determining custody level and eligibility for return to duty programs. A prisoner who maintains a positive attitude while in pretrial confinement has a track record the cadre can draw upon in making such recommendations.

As advocates, we naturally try to avoid adverse consequences for our clients, and keeping clients out of confinement is generally assumed to be in their best interests. At least in the beginning, most clients will insist that you, as their defense counsel, do all that you can to win their release. In the scramble to win the release of the client, the possibility that the client's long-term interests might be better served by having him remain in pretrial confinement is often overlooked. The following discussion is not intended to encourage defense counsel to "roll over" on pretrial confinement decisions. On the other hand, with many clients there is little or no chance of securing their release. A full and frank discussion with these clients of some of the advantages of remaining in pretrial confinement may lead to fewer clients becoming disgruntled at their attorneys' inability to secure their release.

Ask the client to consider the following questions. Is he likely to commit other offenses? Is the unit "out to get him?" Is the case going to be disposed of by a guilty plea, with confinement a likely part of the sentence adjudged? Does he have a substance abuse problem? Does the government have a speedy trial problem? Can the case be adequately prepared for trial with your client in pretrial confinement? If the answer to any question is "yes," there may be significant advantages for your client to remain in pretrial confinement.

Pretrial confinement offers soldiers relatively few opportunities to get into serious trouble. The conditions of confinement are structured to keep problems to a minimum. Any problems that do develop are normally handled internally by the confinement facility's disciplinary and adjustment board.[69] Soldiers released from confinement and returned to their military unit, however, have innumerable opportunities to get into further trouble. Clients released from confinement are normally placed on severe restriction, and their actions are watched very closely by their chain of command. Some commanders view a soldier being returned to their unit from the confinement facility as a slap in the face to their military authority and look for ways to return the soldier to the confinement facility. Any misconduct usually results in an immediate return to pretrial confinement and an additional charge added to the client's charge sheet. Clients who were originally confined because of a series of military offenses that make it clear

[66] United States v. Rolfe, 24 M.J. 756 (A.F.C.M.R. 1987), *pet. denied*, 25 M.J. 238 (C.M.A. 1987).

[67] *Otero*, 5 M.J. at 784 n.6. The court suggests that the trial judge should have the power to conduct a de novo review of the decision to hold a soldier in pretrial confinement. *See also* United States v. Van Slate, 14 M.J. 897 (N.M.C.M.R. 1982). While both of these cases predate the 1984 Manual for Courts-Martial, trial judges may be willing to find inherent authority to conduct de novo reviews, particularly when the magistrate is not a judge.

[68] *See, e.g.*, Frage v. Moriarty, 27 M.J. 173 (C.M.A. 1988); Bertal v. United States, 9 M.J. 390 (C.M.A. 1980); Courtney v. Williams, 1 M.J. 267 (C.M.A. 1976).

[69] *See* AR 190-47, para. 9-12. The D & A Boards, as they are commonly known, handle prisoner misconduct of various types, including minor and severe infractions of the confinement facility's rules.

that the client has not adapted to military life or that the client and the command do not get along are at the greatest risk of returning to confinement with additional charges. Drug dependent soldiers are also at risk.

Make certain that your client understands that he or she will earn day-for-day credit against any confinement adjudged in his case.[70] If, after evaluating your client's case, you believe that a conviction followed by confinement is a likely outcome, your client may want to earn that credit while awaiting trial. If released from pretrial confinement and placed on some form of severe restriction, the soldier may not be much better off than when in confinement. If the command is receiving advice from the trial counsel, the terms of the restriction may be quite severe, but not severe enough to warrant credit for pretrial restriction tantamount to confinement.[71]

Clients with substance abuse or psychological problems are often better off remaining in pretrial confinement, where access to drugs or alcohol can be controlled and where treatment for their problems is often mandated. This start at rehabilitation can be effectively used in your client's trial.[72] The confinement counselors may be willing to write letters about the client's therapy for the court's consideration. At the very least, pretrial confinement will keep your client away from any drugs or alcohol so that he can make a respectable and coherent appearance on the day of the court-martial.

Speedy trial concerns should not be overlooked. While the *Burton* demand rule may be dead,[73] the fact that a soldier is in pretrial confinement puts a greater burden on the government to try the case quickly. If there are any complications in the case at all, an astute defense counsel may use the government's speedy trial concerns as a bargaining chip for the client in pretrial confinement.

Another factor is that pretrial confinement is viewed as punishment by the chain of command as well as by the client. The command may be more willing to recommend approval of a discharge in lieu of court-martial if the client has already spent some time in pretrial confinement.

Cover these issues with your client. Evaluate each case individually. The negative aspects of confinement must be balanced against the positive aspects. The stigma attached to being in confinement, the heavily restrictive nature of confinement, and the inconvenience of working with clients in confinement must be balanced against the positive aspects of pretrial confinement discussed above. Clients immediately understand the negative aspects of pretrial confinement. Many clients, however, wish to remain in confinement when they learn about the positive aspects of pretrial confinement.

Conclusion

Defense counsel normally have an uphill battle when fighting for the release of a client from pretrial confinement. In most pretrial confinement hearings, no matter how hard or well the defense counsel argues, the client will not be released. It is very difficult to win the release of a client in cases involving serious violence, extended absence without leave, threats to witnesses, or repeated criminal acts. Defense counsel should be careful, however, not to assume that there is no chance for success based on the nature of the charges alone. Repeated efforts to win the release of a client can prevail, even in the most unlikely circumstances.[74] A careful evaluation of what is in the client's best interests and the facts of each case must be undertaken before any conclusions can be reached. Defense counsel should not overlook the importance of doing a thorough job of handling a client's pretrial confinement situation. An early victory or the appearance of thorough preparation and active support can often win the client's confidence at an early stage of the case.

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[70]United States v. Allen, 17 M.J. 126 (C.M.A. 1984) (soldier is entitled to day-for-day credit for any pretrial confinement).

[71]Restriction tantamount to confinement will also warrant day-for-day credit against any sentence adjudged. United States v. Mason, 19 M.J. 274 (C.M.A. 1985). The difficulty is in determining what restriction justifies award of sentence credit. *Compare* United States v. Smith, 20 M.J. 528 (A.C.M.R. 1985), *pet. denied,* 21 M.J. 169 (C.M.A. 1985) *with* Washington v. Greenwald, 20 M.J. 699 (A.C.M.R. 1985), *writ appeal denied,* 20 M.J. 324 (C.M.A. 1985); Wiggins v. Greenwald, 20 M.J. 823 (A.C.M.R. 1985), *writ appeal denied,* 20 M.J. 196 (C.M.A. 1985).

[72]*See* AR 190-47, chap. 6, sec. III; USAREUR Supplement to AR 190-47, para. 8-20(9).

[73]*See* United States v. McCallister, 27 M.J. 138 (C.M.A. 1988) (modifying the speedy trial rule set out in United States v. Burton, 44 C.M.R. 166 (1971)). R.C.M. 707 adopts the 90-day rule first established in *Burton*, with some modifications.

[74]In 1988, defense counsel in Europe were successful in winning the release from pretrial confinement of two soldiers charged with premeditated murder.

Trial Judiciary Note

Annual Review of Developments in Instructions

Colonel Herbert Green
Military Judge, Fifth Judicial Circuit

This article is a review of some of the more important appellate cases of the last year involving instructional issues

Offenses

In *United States v. Mance*[1] the Court of Military Appeals comprehensively examined the elements of knowledge inherent in wrongful drug offenses. It determined that knowledge of the presence of the substance and of its contraband nature were essential elements of the offenses.[2] These elements could be established by direct evidence or by logical inferences drawn from the presence of the illegal drugs.[3] It declared that the judge's instructions must include the knowledge elements and that failure to so instruct was prejudicial error.[4] The court then stated:

> The military judge may also instruct the court members that presence of the controlled substance authorizes a *permissive inference* under appropriate circumstances that the accused had the type of knowledge required to establish "possession" or "use" as well as the type of knowledge required to establish "wrongfulness."[5]

United States v. Sims[6] furnished the Army Court of Military Review the opportunity to examine the instructional issue involving these permissive inferences. Sims was convicted of the wrongful use of cocaine. The conviction was based on the results of a urinalysis that established the presence of cocaine. The instructions included the knowledge element required by *Mance* and also indicated that the members could infer that the use was wrongful.[7] The judge did not instruct how the members could determine the requisite knowledge involving presence and made no mention of permissive inferences involving this element.[8] On appeal the omission was claimed as error.

The court found that, under the facts of the case, "the military judge should have instructed that knowing ingestion of a controlled substance can be inferred from its presence in the body."[9] No objection to the instruction was made, nor was there a request for an additional instruction. Moreover, the court noted that an instruction on permissive inferences would have aided the prosecution. Accordingly, the accused was not prejudiced by the absence of the instruction.

One of the most basic concepts in the law of instructions is that instructions should be given on those issues raised by the evidence. Accordingly, if the evidence raises lesser included offenses or defenses, instructions on those matters should ordinarily be given.[10] The same rule applies to the charged offenses. Thus, if some evidence is presented on a charged offense, that offense must be the subject of instructions.[11] When a specification alleges acts that are offenses under two different legal theories, instructions on each theory must be given only if each theory is placed in issue by the evidence.[12] *United States v. Berg*[13] is the latest example of this concept.

The victim was shot in the head and died in an apartment she shared with her two children and the accused. The evidence "tended to show that another person could have been endangered"[14] by the accused's actions. He was charged with homicide under a specification that alleged murder with intent to kill or inflict great bodily harm and murder by committing an inherently dangerous act evincing a wanton disregard for human life.[15] The military judge instructed on both theories of murder and the

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[1] 26 M.J. 244 (C.M.A. 1988).

[2] Uniform Code of Military Justice art. 112a, 10 U.S.C. § 912a (Supp. V 1987) [hereinafter UCMJ].

[3] *Mance*, 26 M.J. at 254.

[4] *Id.* at 255-56. *See* United States v. Brown, 26 M.J. 266 (C.M.A. 1988); United States v. James, 28 M.J. 772 (A.C.M.R. 1989).

[5] *Mance*, 26 M.J. at 256 (emphasis in original).

[6] 28 M.J. 578 (A.C.M.R. 1989).

[7] The pertinent part of the instruction is set out in the opinion. 28 M.J. at 580.

[8] *Sims* was tried three months before the *Mance* opinion was published.

[9] *Sims*, 28 M.J. at 582. The court did not offer an example of a proper instruction. A proper instruction might be similar to the following: You may infer from the presence of cocaine metabolites in his urine that the accused knew he used cocaine. The drawing of this inference is not required.

[10] *See, e.g.*, United States v. Taylor, 26 M.J. 127 (C.M.A. 1988); United States v. Wilson, 26 M.J. 10 (C.M.A. 1988).

[11] *See, e.g.*, Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 920(e) [hereinafter MCM, 1984, and R.C.M.].

[12] *Cf.* United States v. Vidal, 23 M.J. 319 (C.M.A. 1987).

[13] 28 M.J. 567 (N.M.C.M.R. 1989).

[14] *Id.* at 569.

[15] MCM, 1984, Part IV, para. 43. Article 118, UCMJ proscribes four types of murder. Article 118(2) provides that anyone who without justification or excuse kills another with the intent to kill or inflict great bodily harm is guilty of murder. Article 118(3) provides that a killing without justification or excuse is murder if the perpetrator is engaged in an act which is inherently dangerous to others and evinces a wanton disregard of human life. The short form specification alleging murder proscribed by articles 118(2) and 118(3) is identical. Therefore, both theories of murder are alleged in the same short form specification. Whether both forms of murder are in issue in any particular case depends on the evidence presented in court.

accused was convicted. The court set aside the conviction. It held that when the accused's animus is directed solely at the deceased victim, the accused cannot be found guilty of murder resulting from an inherently dangerous act.[16] Because the instructions permitted such a finding, the conviction could not stand.

The court's holding is based wholly on its belief that an unlawful killing is not a violation of article 118(3) if the killer's animus is directed solely toward the victim. It cited *United States v. Davis*[17] as its authority. *Davis*, however, provides no support for that belief. In *Davis* an altercation between the accused and a taxi driver resulted in the death of the driver. The accused was charged with felony murder— death occurring during the perpetration of a robbery.[18] He was convicted of unpremeditated murder.[19] Because the instructions in *Davis*, as in *Berg*, covered both theories of unpremeditated murder (arts. 118(2) and 118(3)), the court reviewed the elements of article 118(3). It held that article 118(3)) prohibits killing resulting from conduct

> which is inherently dangerous to others in that it is directed towards persons in general rather than against a single individual in particular—that is where the actor has evinced a wanton disregard of human life in the general or multiple sense. Since, in this case the evidence disclosed that accused's wicked acts were directed solely against [the taxi driver]—so that *the lives of no other persons were placed in jeopardy*—it was manifest error [to instruct on the elements of article 118(3)].[20]

The holding of *Davis* is that no violation of article 118(3) occurs if only one person is put in jeopardy by the accused's conduct. That the animus is directed at one person is immaterial. The latter was made clear by the Court of Military Appeals less than one year after it decided *Davis*.

In *United States v. McDonald*[21] the accused and the victim argued in a squad tent. The accused subsequently drew a pistol, fired three times, and killed the victim. The court held that "firing a pistol under these circumstances certainly was an inherently dangerous act to every soldier in the close confines of that tent as well as to those in the immediate vicinity."[22] Accordingly, even though the accused's animus was directed solely towards the victim, he could be found guilty of a violation of article 118(3).

The court in *Berg* misread the law. As the court recognized, because others were endangered by the accused's actions, murder proscribed by article 118(3) was placed in issue by the evidence. Accordingly, the military judge properly instructed on the elements of that offense.[23]

In *Unger v. Ziemniak*[24] the Court of Military Appeals reaffirmed its longstanding position that the military's compulsory urinalysis drug-testing program does not violate the constitutional prohibition against unreasonable seizures.[25] The court cautioned, however, that the manner of taking the urine may be so humiliating or degrading that an order to submit a sample under those conditions could be unlawful. Accordingly, in a disobedience case, when evidence is presented of an order to provide a urine specimen under conditions alleged to be unreasonable, the military judge should instruct that

> unless the members have been convinced beyond a reasonable doubt that the requirements for producing the urine specimen—including the manner in which the direct observation was to be performed—were reasonable and not unduly humiliating or degrading the order was illegal and the accused should be acquitted.[26]

In *United States v. Bradley*[27] a drill sergeant was charged with the rape and forcible sodomy of a trainee's wife. While the trainee was at his unit, the accused went to

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[16] *Berg*, 28 M.J. at 569.

[17] 10 C.M.R. 3 (C.M.A. 1953).

[18] UCMJ art. 118(4).

[19] The court was instructed that unpremeditated murder was a lesser included offense.

[20] *Davis*, 10 C.M.R. at 9 (emphasis added).

[21] 15 C.M.R. 130 (C.M.A. 1954).

[22] *Id.* at 133.

[23] The following hypothetical further illustrates this author's belief that the holding in *Berg* was erroneous. X drives his automobile at a high rate of speed into a group of people intending to strike one of them. Unfortunately he succeeds and the intended target is killed. Under the holding in *Berg*, the accused would not be liable for murder under article 118(3) because his animus was directed solely at one person. Moreover, if the accused was drunk, which may be a defense to a violation of article 118(2) (*see* United States v. Tilley, 25 M.J. 20 (C.M.A. 1987)), he may not be guilty of any degree of murder. It is difficult to accept that such a consequence was intended by the drafters of article 118.

[24] 27 M.J. 349 (C.M.A. 1989).

[25] U.S. Const. amend XIV; *see* Murray v. Haldeman, 16 M.J. 74 (C.M.A. 1983).

[26] *Unger*, 27 M.J. at 359. The instruction is similar but not identical to the standard instruction in the Benchbook. Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-23 n.4, chap. 1 (15 Feb. 1985) [hereinafter Benchbook]; *see also* Benchbook, para. 5-8.

[27] 28 M.J. 197 (C.M.A. 1989).

the wife's trailer and, after various overt and implied threats and intimidating acts, engaged in sexual intercourse and fellatio. His defense was consent. After instructions, a member asked for an interpretation of the word force—"whether it is physical, mental, emotional ... or what."[28] The military judge responded by stating that the force required must either overcome the victim's resistance or put her in such a position where she makes no resistance.[29] On appeal the defense claimed the instruction was erroneous because it limited the concept of force to actual force.[30] The Court of Military Appeals affirmed. It acknowledged that the challenged instruction appeared to limit the concept of force to actual force, but stated that the instructions previously given properly advised the members of the concept of constructive force.[31] Accordingly, no prejudicial error occurred.

The military judge believed that the member was asking how much force is necessary to commit rape.[32] The answer was a modification of the standard robbery instruction.[33] Neither appellate counsel nor the Court of Military Appeals interpreted the question as the military judge did. Accordingly, the court did not address the question of how much force is necessary.

The answer to that question is not clear. In appropriate cases, the force used need not be overt or physically brutal, but can be subtle and psychological.[34] The force may be actual or constructive. Constructive force may consist of expressed or implied threats of bodily harm.[35] Where the victim is unable to resist because of lack of mental or physical faculties or where she is asleep, the force involved in penetration will suffice.[36] When the victim does resist at least two questions remain unanswered: 1) How much force is necessary?, and 2) Was the instruction given in *Bradley* a correct answer to that question?

Defenses

In 1988, in a certainly less than momentous case,[37] the Court of Military Appeals reemphasized the law regarding instructions on affirmative defenses. It held that when some evidence of an affirmative defense is presented to which the members might attach credit if they desire, it was the duty of the military judge to instruct on that defense.[38] This is a *sua sponte* duty and one that is not waived by the absence of a defense request for an instruction.[39] Recently, the results in a significant number of cases have turned on the issue of whether the evidence has raised a defense that should have been the subject of *sua sponte* instructions.

In several cases the Army Court of Military Review held that the evidence was insufficient to raise an affirmative defense. In *United States v. Box*[40] the charge was aggravated assault by intentionally inflicting grievous bodily harm.[41] The evidence indicated that the accused had consumed several beers and was in some state of intoxication. The court held, however, that mere intoxication was not enough to raise the defense. To raise the defense the evidence must show the accused was incapable of forming the necessary intent. It is not enough to show that alcohol clouded the accused's judgment. Rather, "there must be credible evidence that the alcohol removed his ability to make *any* judgement."[42] A different panel held that a blood alcohol level of 1.87 was insufficient to raise intoxication as a defense to the same statutory violation.[43]

In a third case[44] a heated and profane exchange between a warrant officer and the accused was followed by an order to be at ease. The accused continued the exchange and eventually was tried for disobedience. The defense was divestiture.[45] The court stated that the language used was

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[28] *Id.* at 201.

[29] *Id.* The instruction is set out in the opinion.

[30] Assuming the instruction was error, it's difficult to see how it would prejudice the accused.

[31] *Bradley*, 28 M.J. at 202. The instructions are set out in the opinion, *id.* at 202 n.4.

[32] *See* Record of Trial, at 461-63. The author was the trial judge.

[33] Benchbook, para. 3-92.

[34] *See* United States v. Torres, 27 M.J. 867, 869 (A.F.C.M.R. 1989).

[35] *See* United States v. Hicks, 24 M.J. 3 (C.M.A. 197). The facts in *Hicks* are remarkably similar to those in *Bradley*.

[36] MCM, 1984, Part IV, para. 45. *See* United States v. Robertson, 34 C.M.R. 828 (A.F.B.R. 1963), *rev'd on other grounds*, 34 C.M.R. 108 (C.M.A. 1963); *see also* United States v. Bonano-Torres, 29 M.J. 845 (A.C.M.R. 1989); *see generally* United States v. Booker, 25 M.J. 114 (C.M.A. 1987).

[37] United States v. Taylor, 26 M.J. 127 (C.M.A. 1988). *Taylor* involved serious offenses—multiple rapes in the barracks. The facts and legal issues were so clear that the need for a written opinion from the Court of Military Appeals is not apparent. It appears that the court issued a written opinion solely to reemphasize existing law.

[38] *Taylor*, 26 M.J. at 130-31.

[39] *Id.* at 128-29.

[40] 28 M.J. 584 (A.C.M.R. 1989).

[41] UCMJ art. 128(b)(2).

[42] *Box*, 28 M.J. at 585.

[43] United States v. Haynes, 29 M.J. 610 (A.C.M.R. 1989).

[44] United States v. Collier, 27 M.J. 806 (A.C.M.R. 1988).

[45] *See generally* United States v. Richardson, 7 M.J. 320 (C.M.A. 1971); United States v. Struckman, 43 C.M.R. 333 (C.M.A. 1971); United States v. Johnson, 43 C.M.R. 604 (A.C.M.R. 1970); MCM, 1984, Part IV, paras. 13C(5), 14C(1)(d); Benchbook, para. 3-25 n.5.

certainly not that of the parlor or drawing room. Nevertheless, it was typical of that used in line units and motor pools. To raise divestiture, the language must have been outside the norm of daily activities. Because it was not so shocking, the failure to give a divestiture instruction was not error.[46] In a fourth case[47] another panel held that where the evidence in a rape case shows that there was either consent or a rape, and that no middle ground exists, the defense of mistake is not raised by the evidence.[48]

United States v. Rose[49] represents the other side of the equation. The accused was charged with aggravated assault by intentionally inflicting grievous bodily harm. The evidence established that the victim struck the first blow, that the accused retreated and brandished a bottle, that the victim was stabbed, and that shortly after the incident the accused said he acted in self-defense. The defense requested that a self-defense instruction be given. The military judge refused because the accused did not testify that he believed he was in danger of grievous bodily harm. The accused was convicted and the Court of Military Appeals reversed.

It held that the accused's testimony regarding self-defense was not a *sine qua non* for a self-defense instruction.[50] The accused's belief as to danger could be shown by circumstantial evidence. Such a belief could be inferred from the accused's conduct and his statements after the incident. Because the evidence taken as a whole raised the issue of self-defense, the refusal to give the instruction was prejudicial error.

The failure to give a self-defense instruction was also at issue in the *Bradford*[51] case. The evidence indicated that the victim twice approached the accused at a night club, said he was a boxing champion, and tried to shadow box. Later the accused approached the victim and asked why the victim had assaulted the accused's friend. The victim then punched the accused, knocking him backward. The accused drew a knife, held it at his side, and then brandished it at the victim. The protagonists approached each other, grabbed one another, and fell to the floor. In the struggle the victim received several stab wounds. Apparently, there was no direct evidence that the accused intentionally stabbed the victim. The accused was charged with aggravated assault and defended on a theory of accident and self-defense by using deadly force to deter.[52] The military judge instructed in accordance with the defense theory,[53] and the accused was convicted. On appeal the issue was the lack of a self-defense instruction regarding the actual use of deadly force.[54]

The court reversed but its reasoning is not clear. The evidence tended to show that the victim was a bully, a mean drunk, and considerably larger than the accused. Apparently, the appellate court believed that the members could find that the stabbing was intentional, yet justified in self-defense. Because that theory was raised by the evidence but not presented in the instructions, reversal was required.

Bradford clearly illustrates the general rule that defenses raised by the evidence must be the subject of instructions. It may be that the accused intentionally stabbed the victim, but did not so testify because he did not apprehend great bodily harm or because he did not believe the force he used was necessary. On the other hand, the stabbing may not have been intentional or grossly negligent. With the evidence in such a posture and in light of the defense theory of the case, the decision may be an example of unwarranted solicitude for the accused. Nevertheless, because the accused testified, the present situation might have been avoided if the accused was asked if he intentionally stabbed the victim, or if he apprehended great bodily harm to himself, or whether he believed the force he used was necessary. It is difficult to believe that in a case with an experienced military judge the questions were not asked.[55] If they were, no mention of them is found in the opinion. Had they been asked, the instructional issues most likely would have been resolved at the trial level.[56]

The mistake of fact instruction with respect to specific intent crimes was a critical issue in two opinions. In *United States v. Santulli*[57] the accused was charged with

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[46]The latest divestiture case and one in which the instruction is set out is United States v. King, 29 M.J. 885 (A.C.M.R. 1989).

[47]United States v. Eck, 28 M.J. 1046 (A.C.M.R. 1989).

[48]No request for an instruction on the defenses was made in any of the four cases.

[49]28 M.J. 132 (C.M.A. 1989).

[50]*See, e.g.*, United States v. Gordon, 34 C.M.R. 94, (C.M.A. 1963); *see also* United States v. Curtis, 1 M.J. 297 (C.M.A. 1976).

[51]United States v. Bradford, 29 M.J. 829 (A.C.M.R. 1989).

[52]*See* R.C.M. 916(e),(f).

[53]*See* Benchbook, paras. 5-2 V, 5-4.

[54]*See id.* at para. 5-2 I.

[55]*See* Mil. R. Evid. 614. Often during trials the evidence necessary to decide whether an instruction should be given is unclear. At these times the military judge should ask appropriate questions in attempt to resolve the doubts. This questioning is not conducted to help either side. Rather, it is to help the military judge perform one of his more important tasks, that of giving the members proper and comprehensive instructions.

[56]In this case, at defense request the judge included in his preliminary instructions the instruction on the use of excessive force to deter. *Bradford*, 29 M.J. at 831. The practice of giving preliminary instructions concerning procedural matters at the beginning of the trial is recommended. *See* United States v. Waggoner, 6 M.J. 77 (C.M.A. 1978); Benchbook para. 2-24. These may also include specific instructions concerning credibility and reasonable doubt. *See* United States v. Ryan, 21 M.J. 627 (A.C.M.R. 1985). On occasion, as here, counsel have requested that the preliminary instructions include a specific defense that counsel believe will be in issue. The giving of such an instruction is within the discretion of the judge but the practice is not without some risks. One of the inherent dangers is that all parties to the trial including the judge may concentrate on the instructed issue and overlook other issues that also must be the subject of instructions. This may have happened in *Bradford*.

[57]28 M.J. 651 (A.C.M.R. 1989).

larceny. He claimed he believed the property was abandoned and his pawning of the property was not an offense. The military judge instructed that honest and reasonable mistake that the property was abandoned was a defense. The instruction was erroneous because abandonment negates the element of larceny involving the specific intent to permanently deprive. As such, belief that the property had been abandoned need only be honest.

In *United States v. Daniels*[58] the accused was charged with rape, but convicted of attempted rape. The judge instructed that honest and reasonable mistake as to consent was a defense. Attempted rape, however, is a specific intent crime. Therefore, the mistake need only be honest. Because a correct instruction with respect to the lesser offense was not given, reversal was required.[59]

In 1986 Congress added article 50a to the Uniform Code of Military Justice.[60] The new statute prescribed the defense of lack of mental responsibility. Subsequently, the Manual for Courts-Martial was amended in order to be consistent with the new statute.[61] The Manual change also provided that evidence of a mental condition not amounting to the defense of mental responsibility was not admissible on the issue of whether the accused entertained a specific state of mind that was an element of the offense charged.[62] Shortly thereafter, the Court of Military Appeals held that this Manual prohibition restricted mental responsibility evidence permitted by article 50a and therefore would not be enforced.[63]

United States v. Tarver[64] was tried after the adoption of article 50a and the change to the Manual, but before the Court of Military Appeals invalidated the Manual's evidentiary limitation. The accused was charged with premeditated murder. The military judge granted the prosecution's motion *in limine* and prohibited the defense from presenting evidence of a mental condition that did not amount to the defense of lack of mental responsibility. When the case reached the appellate level, it was clear that the judge's ruling was erroneous, and the court reversed. It declared that evidence of a mental condition that might negate a statutory element of *mens rea* was admissible. "Further, when the evidence establishes a mental condition which may negate an accused's ability to entertain a required *mens rea* element of an offense, the military judge must, *sua sponte* instruct."[65] The court then cited a Benchbook instruction that presumably satisfies the instructional requirement.[66]

The cited instruction states in part that the members should determine whether the accused has a mental condition and whether, as a result of that condition, the accused lacked substantial capacity to have the relevant statutory *mens rea*. The instruction parallels the basic instruction on lack of mental responsibility[67] and appears to require that the members make predicate findings that a mental condition exists and that, as a result of the condition, there was a lack of substantial capacity. Neither the statute nor the Manual requires these predicate decisions. Moreover, the lack of substantial capacity standard should only apply to the defense of lack of mental responsibility. It appears that the *Tarver* court has adopted a specific mental condition instruction that is not necessary. The Benchbook instruction has provided constraints that are similarly unnecessary.

In fact, what is needed is adherence to certain basic principles. First, any competent evidence relating to the lack of the required *mens rea* should be admissible. Second, an instruction should be given requiring the members to consider all the evidence in determining whether the prosecution has established the required *mens rea* beyond reasonable doubt. This instruction should be tailored to indicate the specific *mens rea* evidence that should be considered. If adherence to these principles is maintained, proper instructions without artificial and unnecessary constraints will be given.[68]

In two other cases involving instructions on defenses the Court of Military Appeals reaffirmed existing law. In one[69] it held that the issue of objective entrapment[70] is for the judge and not the members. Accordingly, an instruction regarding objective entrapment should not be given. In the other case[71] it held that good military character is a pertinent trait and a defense to charges of sodomy and adultery with the wives of an accused's enlisted subordinates. Therefore, the refusal to give a good character instruction was error.[72]

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[58]28 M.J. 743 (A.F.C.M.R. 1989).

[59]The accused's testimony only raised the issue of consent. Testimony of a psychologist raised the issue of mistake. In contrast to the proceedings in United States v. Rose, 28 M.J. 132 (C.M.A. 1989), this was recognized at the trial.

[60]UCMJ art. 50a.

[61]R.C.M. 916(k).

[62]R.C.M. 916(k)(2).

[63]Ellis v. Jacob, 26 M.J. 90 (C.M.A. 1988).

[64]29 M.J. 605 (A.C.M.R. 1989).

[65]*Id.* at 609.

[66]Benchbook, para. 6-5.

[67]Benchbook, para. 6-4.

[68]*See* United States v. Frisbee, 623 F. Supp. 1217 (N.D. Cal. 1985), *Accord* United States v. Gold, 661 F. Supp. 1127 (D.D.C. 1987). *See generally* United States v. Pohlot, 827 F.2d 889 (3d Cir. 1987).

[69]United States v. Dayton, 29 M.J. 6 (C.M.A. 1989).

[70]The doctrine of objective entrapment is concerned "with the elimination of undesirable police practices rather than with the accused's state of mind or predisposition." *Dayton*, 29 M.J. at 11. *See generally* United States v. Vanzandt, 14 M.J. 332 (C.M.A. 1982).

[71]United States v. Wilson, 28 M.J. 48 (C.M.A. 1989).

[72]*See id.* at 49 n.1 and cases cited therein.

Evidence

One of the most heavily litigated rules of evidence is Rule 404(b).[73] The rule recognizes that evidence of other crimes, wrongs, or acts may be relevant in a particular case. When such evidence is offered, the military judge must determine whether it is in fact relevant and not unduly prejudicial,[74] and the judge must instruct the members on the use and limits of that evidence.[75] The rule can also be a trap for the unwary judge. At times, judges have permitted counsel to offer 404(b) evidence without making them clearly articulate their theory of admissibility (relevance). At other times, judges have permitted counsel to present a litany of reasons that is only a repetition of Rule 404(b) itself. When judges do not pin down counsel or when they permit rote incantations of the language of Rule 404(b), they do themselves a disservice and put at risk the ability to achieve a fair trial. Two cases in the last year are examples of the lack of precision in Rule 404(b) litigation that resulted in instructional errors.

In *United States v. Ferguson*[76] the accused was charged with committing sodomy and other sexual crimes with his stepdaughter. The prosecution was permitted to present evidence of a unique method of commission of the sodomy[77] that occurred with the stepdaughter significantly earlier than the charged offense. It also presented evidence of sodomy by this unique method committed with another stepdaughter. The military judge did not make the trial counsel clearly articulate the basis of admissibility of the evidence regarding the other stepdaughter. Nevertheless, he admitted it and instructed that it could be considered on the issue of identity. Later, he changed his mind and stated he intended to instruct that the basis was intent. He subsequently changed his mind again because specific intent is not an element of sodomy.[78] Finally, he instructed that the evidence was relevant to *modus operandi*.

The Court of Military Appeals reversed. It held that *modus operandi* is only relevant to identity.[79] Because identity was not in issue in the case, the admission of the evidence and the instruction was erroneous.

In *United States v. Duncan*[80] the accused was charged with the premeditated murder of his fiancee. The military judge permitted the prosecution to present evidence that two years earlier the accused attempted to kill his present ex-wife. The military judge initially ruled that the evidence was admissible to show the existence of a motive to kill the fiancee and that the accused could harbor the intent to kill. He instructed the members that the evidence could only be considered "to prove the accused was capable of forming a specific intent to kill"[81] and that they could not consider that the accused is a bad person or has criminal tendencies. The appellate court found that the evidence only showed the accused's bad character, which is not permissible. Accordingly, the instruction that purported to restrict the consideration of bad character had no practical or legal effect.

At one time, the giving of a *sua sponte* uncharged misconduct instruction was mandatory and the failure to do so was reversible error.[82] Eventually, the Court of Military Appeals modified that rule. In *United States v. Thomas*[83] it stated that when uncharged misconduct is inextricably related to the time and place of the offense charged, no *sua sponte* instruction is required. Conversely, when there is no nexus to the time and place of charged offense, an instruction is required "at least in the absence of a defense request to the contrary."[84] The modified rule applied to cases tried prior to the adoption of Military Rule of Evidence 105.[85] That rule provides that when evidence is presented for a limited purpose "the military judge, upon request, shall restrict the evidence to its proper scope and instruct the members accordingly."[86]

In 1988, in *United States v. McIntosh*[87] the Court of Military Appeals reexamined the requirement for instructions when evidence of uncharged misconduct with no nexus to the time and place of the offense charged was admitted in evidence. Although the court made no reference to *Thomas* or Rule 105, it held that the absence of an unrequested limiting instruction was error.

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[73] Mil. R. Evid. 404(b).

[74] United States v. Reynolds, 29 M.J. 105 (C.M.A. 1989); United States v. White, 23 M.J. 84 (C.M.A. 1986); *see* Huddleston v. United States, 108 S. Ct. 1496 (1988); United States v. Mirandes-Gonzalez, 26 M.J. 411 (C.M.A. 1988).

[75] United States v. Thomas, 11 M.J. 388 (C.M.A. 1981); United States v. Dagger, 23 M.J. 594 (A.F.C.M.R. 1986).

[76] 28 M.J. 104 (C.M.A. 1989).

[77] The facts are set out in detail in the opinion.

[78] Two different concepts of intent may be involved in sex offense cases. One is the intent to gratify the individual's sexual desires. The other is the intent to commit the act. Even if the sex offense is a general intent crime, the intent to commit the act may be in issue in a particular case. Therefore, 404(b) evidence showing intent may be relevant in a general intent sex offense case.

[79] Possibly, the court has reconsidered this extremely narrow and unfortunate position. *See* United States v. Reynolds, 29 M.J. 105, 109-10 (C.M.A. 1989).

[80] 28 M.J. 946 (N.M.C.M.R. 1989).

[81] *Id.* at 950.

[82] *See* United States v. Grunden, 2 M.J. 116 (C.M.A. 1977).

[83] 11 M.J. 388 (C.M.A. 1981).

[84] *Id.* at 392.

[85] The Military Rules of Evidence went into effect on 1 September 1980.

[86] Mil. R. Evid. 105.

[87] 27 M.J. 204 (C.M.A. 1988).

Less than ten months later, in *United States v. Trimper*[88] the court once again considered the issue. The accused made sweeping statements on both direct and cross-examination that he had never used illegal drugs. In rebuttal, the prosecution offered evidence of the results of a urinalysis that showed the accused tested positive for cocaine. No instruction limiting the use of this evidence was given. The court stated:

> Upon request, the defense would have been entitled to a limiting instruction to this effect. However, there was no request that the members be instructed as to the limited purpose for which the challenged evidence was admitted; and, absent such a request, the military judge was not required to advise the members in this regard. Mil. Rule Evid. 105.[89]

Thomas, McIntosh, and *Trimper,* all written by Chief Judge Everett, certainly send mixed signals to the trial judge and to counsel. The waters are muddied and the proper course is certainly not clear. Therefore, until the court finally decides whether Rule 105 is in fact the law, military judges should give uncharged misconduct instructions *sua sponte* for evidence not having a time and place nexus to the offense charged, unless the defense requests otherwise.

The due process clause of the Constitution requires that to prove guilt, the prosecution must establish each element of the offense beyond reasonable doubt.[90] When a judge instructs that a jury may presume facts that establish an element, the accused's rights are violated.[91] In *Carella v. California*[92] the judge instructed that the jury could presume theft by fraud and embezzlement.[93] The Supreme Court reversed *per curiam,* holding that the instructions and result in the California courts were "plainly at odds with prior Supreme Court decisions."[94]

Presumptions in instructions were also mentioned in *United States v. Sparks*.[95] In this drug case the judge instructed that there was a permissible presumption of regularity in the handling of drugs at the laboratory.[96] He also stated that the members were not required to accept this presumption. The Court of Military Appeals affirmed. Although the court found that the word "inference" should have been used instead of "presumption," the judge stated the presumption was permissible and could be disregarded. In the absence of a defense objection, the accused was not entitled to relief.[97]

United States v. McKinnie[98] involved the accomplice testimony instruction. The accused, a military instructor, was charged with fraternization with several students in violation of a regulation. The regulation applied to both parties to the relationship and both could violate it. The students testified against the accused, and the defense requested that the accomplice testimony instruction[99] be given. The judge refused. The refusal to give the instruction was error,[100] but, under the facts, non-prejudicial.

Prior to the adoption of the Military Rules of Evidence, military law followed the Massachusetts rule concerning voluntariness of confessions.[101] Under that rule, the military judge was initially required to determine the voluntariness of a confession. If he determined it was voluntary, he was required to instruct that the members had to find beyond reasonable doubt that a confession was voluntary before they could consider it as evidence against the accused.[102] Under present law, the military judge makes the final decision on the admissibility of a confession.[103] The accused may present the members evidence with respect to the voluntariness of the statement. If such evidence is presented, the judge must instruct that the members should consider such evidence and give the pretrial statement the weight it deserves in light of all the evidence.[104]

In *United States v. Miller*[105] the defense attempted to resurrect the long superseded confessions procedure. On appeal, the defense cited a 1975 military case[106] as requiring the military judge to instruct in accordance with the

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[88] 28 M.J. 460 (C.M.A. 1989).

[89] *Id.* at 468.

[90] *In Re* Winship, 397 U.S. 358 (1970).

[91] Yates v. Aiken, 108 S. Ct. 534 (1988); Francis v. Franklin, 471 U.S. 307 (1985); Sandstrom v. Montana, 442 U.S. 510 (1979).

[92] 57 U.S.L.W. 4731 (1989).

[93] The instruction is set out in the opinion.

[94] *Carella,* 57 U.S.L.W. at 4731.

[95] 29 M.J. 52 (C.M.A. 1989).

[96] The instruction is set out in the opinion. *Id.* at 57. The Court of Military Appeals presumes regularity in the handling of drugs at chemical laboratories. *See* United States v. Porter, 12 M.J. 129 (C.M.A. 1981); United States v. Strangstalien, 7 M.J. 225 (C.M.A. 1979).

[97] It held that plain error did not occur. *See* United States v. Fisher, 21 M.J. 327 (C.M.A. 1986).

[98] 29 M.J. 825 (A.C.M.R. 1989).

[99] *See* Benchbook, para. 7-10.

[100] In United States v. Adams, 19 M.J. 996 (A.C.M.R. 1985), a fraternization case similar to *McKinnie*, the court found it was prejudicial error to fail to give an accomplice testimony instruction that had not been requested.

[101] Manual for Courts-Martial, United States, 1969 (Rev. ed.), para. 140a.(2) (hereinafter MCM, 1969); *see* United States v. Clark, 7 M.J. 179 (C.M.A. 1979); United States v. Mewborn, 38 C.M.R. 229 (C.M.A. 1968).

[102] *See generally* Dep't. of Army, Pam. 27-9, Military Judges' Guide, ch. 5 (May 1969).

[103] Mil. R. Evid. 304(e)(1).

[104] Mil. R. Evid. 304(e)(2).

[105] 28 M.J. 998 (A.C.M.R. 1989).

[106] United States v. Graves, 1 M.J. 50 (C.M.A. 1975).

old procedure. The court rejected the claim and affirmed. It held that the confessions procedure set out in the Military Rules of Evidence was proper. As such, the military judge was not required to instruct the members that they should determine voluntariness beyond a reasonable doubt.

Procedure

Procedural matters involving instructional issues were considered in several cases. In *United States v. Baker*[107] the accused pleaded guilty to two specifications of carnal knowledge as lesser included offenses of rape.[108] The military judge conducted a providence inquiry and then entered findings of guilty in accordance with the pleas. The rape charges were then contested in front of the members. When a plea of guilty is made to a lesser included offense, a finding should not be entered if the greater offense is contested.[109] Accordingly, the judge erred by entering the findings of guilty. The court emphasized that the proper procedure is to inform the members of the plea and its meaning and effect prior to receipt of evidence. Afterward, when final instructions are given, the members should be instructed that if the accused is found not guilty of the greater offense, they must find the accused guilty of the lesser.[110]

In *United States v. Pendry*[111] contrary to the Manual[112] the military judge gave instructions on findings prior to argument. The court found the error to be nonprejudicial[113] and recommended that judges be given discretion with respect to the timing of instructions. Most experienced trial judges want as much discretion as possible in "running their court." In many jurisdictions, however, more than one judge presides on a regular basis. The same counsel and members may participate for a significant period of time. Thus, these participants could see the timing of instructions change from case to case depending on the inclination of that day's judge. The inconsistency and confusion that may arise should be considered before adoption of the recommendation.

In *United States v. Kendrick*[114] the court indicated that the procedure requiring the junior member to collect and count the ballots prior to the checking of the ballots by the President ensures accuracy of the vote count. Accordingly, an instruction that advises the junior member to collect the ballots but does not direct him to count them is error.[115]

Sentencing

In *United States v. Denny*[116] the issue was the use in sentencing of the accused's voluntary absence from trial. A Department of the Army Form (DA Form) 4187 reflecting the accused's absence was admitted on the merits to establish that the accused could be tried *in absentia*. In the sentencing phase the judge instructed that the accused could not be sentenced for the absence, but gave no further instructions regarding the absence. The court held that the instruction was not complete. A complete instruction must inform the members how the absence should be considered. The judge should have instructed that the absence could only be considered as it affects the accused's rehabilitative potential. Nevertheless, there was no defense objection, and the error was waived.

Several issues are raised by this case. The first is whether the members should have seen the DA Form 4187 on the merits. The issue of whether the accused could properly be tried *in absentia* is solely for the judge to decide.[117] Thus, it was unnecessary to present the DA Form to the members.[118] Assuming it was proper to present the DA Form to the members, the second issue is whether any limiting sentence instruction was necessary.[119]

Prior to 1969, evidence of uncharged misconduct admitted on the merits could not be considered in sentencing.[120] The law officer was required to instruct that such evidence could only be considered for the purpose for which it was admitted. The 1969 Manual[121] changed the law. Thereafter, any evidence of uncharged misconduct properly

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[107] 28 M.J. 900 (A.C.M.R. 1989).

[108] Prior to the publication of the 1984 Manual, carnal knowledge was a lesser included offense of rape. The 1984 Manual removed carnal knowledge from the list of lesser included offenses of rape. MCM, 1984, Part IV, para. 45(d). It appears that neither the trial participants nor the court recognized the change. Notwithstanding the Manual, it appears that a properly drafted rape specification could include the lesser offense of carnal knowledge.

[109] R.C.M. 910(g).

[110] *See Baker*, 28 M.J. at 901 n.2 and authorities cited therein.

[111] 29 M.J. 694 (A.C.M.R. 1989).

[112] R.C.M. 920(b).

[113] Interestingly, the opinion makes no reference to United States v. Santiago-Davila, 26 M.J. 380, 387 n.6 (C.M.A. 1988), where the Court of Military Appeals indicated some dissatisfaction with a similar procedural violation.

[114] 29 M.J. 792 (A.C.M.R. 1989); *see* United States v. Hutto, ___ M.J. ___ (A.C.M.R. 18 Dec. 1989).

[115] In the absence of objection the error is waived. It is not plain error.

[116] 28 M.J. 521 (A.C.M.R. 1989).

[117] The issue of whether the accused could be tried in absentia was litigated outside the presence of the members. *Denny*, 28 M.J. at 524 n.1.

[118] *See generally* R.C.M. 804.

[119] When an accused is tried *in absentia* the military judge must instruct prior to findings on the effect of the absence. *See* United States v. Minter, 8 M.J. 867, 869 (N.C.M.R. 1980), *aff'd*, 9 M.J. 397 (C.M.A. 1980).

[120] United States v. Turner, 36 C.M.R. 236 (C.M.A. 1966).

[121] MCM, 1969, para. 76a.

received on the merits could be considered by the members in sentencing. No specific limiting instruction was required.[122] The 1984 Manual made no change to the expanded use of this evidence.[123]

In *United States v. Chapman*[124] the Navy-Marine Corps Court of Military Review held that a military judge may consider voluntary absence from trial on the issue of the accused's rehabilitative potential. The Court of Military Appeals summarily affirmed stating that it was proper to consider the voluntary absence "for rehabilitation and retention in the service."[125] In *Denny* the court found that *Chapman* at both appellate levels limited the use of voluntary absence evidence. *Chapman*, however, represents an expansion rather than a limitation on the use of such evidence.

In *United States v. Hardin*,[126] a case decided prior to *Chapman*, the court indicated that no use of voluntary absence evidence could be made in sentencing.[127] The trial judge in *Chapman* rejected that language as *dicta* and opined that he could use the evidence in sentencing as relevant to rehabilitation potential.[128] It was this expansive use of such evidence that was affirmed in both appellate courts. Accordingly, it is far from clear that the *Denny* court was correct as a matter of precedent in ruling that the judge erred by failing to instruct that voluntary absence evidence is limited to the issue of rehabilitative potential.

Under Rule 1001(b)(2)[129] evidence of the accused's past "conduct ... [and] ... performance" as shown by his personnel records are admissible in sentencing. Rule 1001(b)(5)[130] provides that opinion as to rehabilitation potential is also admissible. In *Denny* the court recognized that the DA Form 4187 would not be admissible under Rule 1001(b)(5), but would be admissible under Rule 1001(b)(2). Rule 1001(b)(2) evidence is separate and apart from rehabilitation potential evidence covered in Rule 1001(b)(5). Nevertheless, the court ruled that this evidence, admissible under Rule 1001(b)(2), must be considered only as evidence that is the subject of Rule 1001(b)(5)—rehabilitation potential. In effect, the court ruled that evidence admitted under one subsection of the rule can only be considered as pertaining to evidence referred to in a separate subsection. Furthermore, a limiting instruction is required.[131]

The court's decision is contrary to the plain and unambiguous wording of the Rule. Moreover, it confuses and commingles evidence that is designed by the drafters of the Manual to be considered under separate rationales. The ruling of the court in *Denny* is not required by case law. Moreover, it is the result in part of an unfortunate entanglement of rules of evidence that should be kept separate. Also, it does violence to the clear intent of the Manual's drafters to bring more information to the attention of the sentencing authority. Accordingly, the instructions in *Denny* were neither erroneous nor incomplete.

In *United States v. Maharajh*[132] the military judge instructed that it is the duty of the members to adjudge a punitive discharge if they conclude that further service is not warranted. The instruction is clearly erroneous. It not only informs the members of an improper basis for sentencing, but confuses the concepts of retention and punishment.[133]

Erroneous sentencing instructions were also given in *United States v. Chaves*.[134] At trial counsel's request, the judge instructed that the members should consider the accused's lack of remorse. The lack of remorse was apparently based on the failure of the accused to indicate remorse during his unsworn statement.[135] The court held that the instruction was essentially a comment on the failure to speak.[136] Moreover, such an instruction could only encourage "boiler-plate remorse statements."[137]

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[122] United States v. Worley, 42 C.M.R. 46 (C.M.A. 190).

[123] *See* R.C.M. 1001-1005.

[124] 20 M.J. 717 (N.M.C.M.R. 1985).

[125] 23 M.J. 226 (C.M.A. 1986).

[126] 14 M.J. 880 (N.M.C.M.R. 1982).

[127] *Id.* at 881.

[128] *Chapman*, 20 M.J. at 718.

[129] R.C.M. 1001(b)(2).

[130] R.C.M. 1001(b)(5).

[131] No such limiting instruction is required for evidence admitted under Rule 1001(b)(2). The members are always instructed that the accused is to be sentenced only for the offenses of which he has been found guilty. *See* Benchbook, para. 2-37. The military judge so instructed.

[132] 28 M.J. 797 (A.F.C.M.R. 1989).

[133] *See* United States v. Ohrt, 28 M.J. 301 (C.M.A. 1989), where the court distinguishes the purposes of an administrative hearing—retention or separation—from that of court-martial sentencing—degree and severity of punishment. Although a punitive discharge separates an individual from the service it is a punishment and should not be imposed solely because retention in the service is not warranted. *See also* United States v. Antonitis, 29 M.J. 217 (C.M.A. 1989).

[134] 28 M.J. 629 (A.F.C.M.R. 1989).

[135] The statement covered his personal background, service experience, some of the events leading to the charges, his present work assignment and his life with his new wife and child.

[136] When the accused remains silent, comment on the failure to testify or make any statement is clearly error. When the accused makes a statement in sentencing, however, what he doesn't say, especially when he is not subject to cross-examination, may be more important than what is said. Therefore, comment on the failure to indicate remorse may be proper. In a contested case an expression of remorse on sentencing might tend to irritate members and indicate the accused is not credible. Accordingly, for policy reasons the decision is reasonable.

[137] *Chaves*, 28 M.J. at 693.

In *United States v. Flynn*[138] the court again considered the issue of collateral matters on sentencing.[139] Over defense objection, the military judge instructed that there existed a child molester treatment program at the United States Disciplinary Barracks. In response to members' questions, the judge further instructed that a similar program existed at the Fort Riley Correctional Activity and informed the members of the length of confinement necessary to ensure a transfer to either facility.[140] The court had previously held that

> [w]hether proper counseling programs would be available at Fort Leavenworth during confinement and if so, whether those programs were accessible to appellant were matters that clearly were collateral consequences of the sentence awarded.[141]

Nevertheless, because the defense had introduced evidence suggesting that incarceration of child molesters was not appropriate, evidence of pertinent treatment programs was proper rebuttal.

The court made no specific reference to that part of the instruction that informed the members of the length of sentence necessary to ensure confinement in the various facilities. Judges are aware of service policies that provide for incarceration at various confinement facilities. Court members ordinarily are not privy to such information. In *Flynn* the information was provided in order to place the treatment programs and their availability to the accused in proper focus. The question not resolved by the court, however, is whether the judge should regularly give such information to the members. The argument for giving such information is that it leads to more intelligent sentencing. The contrary argument is that it may lead to longer sentencing to ensure that the accused is sent to a more severe facility.[142]

Capital sentencing instructions were significant issues in two cases. In *Penry v. Lynaugh*[143] the Supreme Court reaffirmed that sentencing authorities must consider all mitigating evidence when deciding whether to impose capital punishment. Texas procedure required juries to answer three questions before capital punishment may be imposed,[144] and its constitutionality had previously been upheld.[145] In *Penry* its constitutionality as applied was challenged. The defendant asserted that under the procedure his mental retardation and status as a victim of child abuse could not be considered by the jury as a mitigating factor.[146] The court agreed and held that the failure to instruct that the accused's mental retardation and childhood abuse were mitigating factors that the jury must consider was prejudicial error.

In *United States v. Curtis*[147] the military judge instructed that in order to adjudge the death penalty,[148] two votes were required. First, the members must unanimously find beyond reasonable doubt that at least one of the aggravating factors existed. Second, they must unanimously agree that the death penalty was appropriate. The accused claimed that the members should also have been instructed that a third vote was necessary. He argued that the members should have been instructed "to vote and unanimously find that any extenuating or mitigating circumstances were substantially outweighed by any aggravating factors."[149] The court rejected the argument and affirmed. It held that only two votes were required.

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[138] 28 M.J. 218 (C.M.A. 1989).

[139] *See, e.g.*, United States v. Henderson, 29 M.J. 221 (C.M.A. 1988) (effect of punitive discharge on retirement pay and benefits); United States v. Murphy, 26 M.J. 454 (C.M.A. 1988) (Air Force regulation governing eligibility for Correction and Rehabilitation Squadron); United States v. Griffin, 25 M.J. 423 (C.M.A. 1988) (effect of sentence with and without punitive discharge on retirement benefits); United States v. Brown, 1 M.J. 465 (C.M.A. 1976) (tax consequences of a sentence); United States v. Quesinberry, 31 C.M.R. 195 (C.M.A. 1962) (specific consequences of a bad conduct discharge).

[140] The discussion with counsel and the instructions are set out in the opinion. *Flynn*, 29 M.J. at 219-20.

[141] United States v. Lapeer, 28 M.J. 189, 190 (C.M.A. 1989). *Lapeer* is factually similar to *Flynn*.

[142] In United States v. Murphy, 26 M.J. 454 (C.M.A. 1988), the defense offered an extract of an Air Force Regulation that set forth the criteria for entrance into a correction and rehabilitation unit. The regulation provided in part that for entrance an accused needed to have no more than 18 months confinement remaining to be served. Despite the similarity, the court in *Flynn* made no mention of *Murphy*. This omission can lead to unnecessary confusion.

[143] 57 U.S.L.W. 4958 (U.S. 1989).

[144] The questions are set out in the opinion. *Id.* at 4960.

[145] Jurek v. Texas, 428 U.S. 262 (1976).

[146] *See Penry*, 57 U.S.L.W. at 4963. Penry argues that his mitigating evidence of mental retardation and childhood abuse has relevance to his moral culpability beyond the scope of the special issues, and that the jury was unable to express its "reasoned moral response" to that evidence in determining whether death was the appropriate punishment.

[147] 28 M.J. 1074 (N.M.C.M.R. 1989).

[148] *See generally* R.C.M. 1004, 1005.

[149] *Curtis*, 28 M.J. at 1078.

Government Appellate Division Note

Resolving the Ambiguity?: The Army Court Decides *United States v. Bowen*

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Introduction

Rule for Courts-Martial 1003(b)(2) provides that "[u]nless a total forfeiture is adjudged, a sentence to forfeiture shall state the exact amount in whole dollars to be forfeited each month and the number of months the forfeitures will last."[1] In a line of decisions beginning with *United States v. White*,[2] the Army Court of Military Review erroneously mandated the convening authority's compliance with R.C.M. 1003(b)(2). Subsequently, the Air Force Court of Military Review followed the Army court's lead.[3] Then, in *United States v. Bowen*[4] the Army court, sitting *en banc*, reversed itself and ruled that the convening authority's action need not comply with R.C.M. 1003(b)(2). In analyzing the propriety of the convening authority's action in that case, however, the Army court demonstrated misplaced reliance on early military law precedents and left open to attack, as ambiguous, actions by convening authorities that specifically provide for forfeitures to run pending the execution of a punitive discharge.

The Prior Decisions

In *White* the Army Court of Military Review held that the convening authority erred in approving a "forfeiture of $426.00 pay per month 'for so long as the accused is entitled to pay'" because the forfeiture provision "did not comply with the express terms" of R.C.M. 1003(b)(2).[5] The Army court apparently determined that this action by the convening authority created a forfeiture of pay to run for an indefinite period of time.[6] Therefore, the court limited "the approved forfeitures to a one month time period."[7] In *United States v. Conforti*[8] the Army court held that the convening authority erred in approving a "'forfeiture of ⅔ pay per month until the bad-conduct discharge is executed.'"[9] As supporting authority, the court cited *United States v. Wakeman*[10] for the proposition that the convening authority's approval of the forfeiture portion of any sentence must comply with the provisions of R.C.M. 1003(b)(2).[11] The convening authority's action, which provided for forfeitures to run "until the ... discharge is executed," was changed to provide for the forfeitures to run for nine months.[12] Despite reaching inconsistent results, *White* and *Conforti* required that, at a minimum, any action taken by the convening authority pertaining to forfeitures must comply with R.C.M. 1003(b)(2).[13]

United States v. Bowen

In *Bowen* the appellant was sentenced to a bad-conduct discharge, forfeiture of all pay and allowances, and reduction to Private E1.[14] The convening authority approved appellant's punitive discharge and reduction in grade, but approved only so much of the forfeiture as provided for "forfeiture of $447.00 pay per month until such time as the bad-conduct discharge is executed."[15] Appellant appealed, asserting "that the convening authority's action with respect to forfeitures is 'ambiguous and irregular in that it fails to state the number of months the partial forfeitures will last as required by R.C.M. 1003(b)(2).'"[16]

The Army court addressed the following issues: 1) Which rules or standards apply when judging the propriety

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1 Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 1003(b)(2) [hereinafter MCM, 1984, and R.C.M. 1003(b)(2), respectively].

2 United States v. White, 23 M.J. 859 (A.C.M.R. 1987).

3 *See, e.g.*, United States v. Frierson, 28 M.J. 501 (A.F.C.M.R. 1989); United States v. Pace, 27 M.J. 829 (A.F.C.M.R. 1988), *pet. denied*, 28 M.J. 162 (C.M.A. 1989); United States v. Darby, 27 M.J. 761 (A.F.C.M.R. 1989), *pet. denied*, 28 M.J. 292 (C.M.A. 1989).

4 United States v. Bowen, 29 M.J. 779 (A.C.M.R. 1989) (en banc).

5 *White*, 23 M.J. at 859.

6 *See id.*

7 *Id.*

8 United States v. Conforti, 26 M.J. 852 (A.C.M.R. 1988), *pet. denied*, 28 M.J. 363 (C.M.A. 1989).

9 *Id.* at 855 (footnote omitted).

10 United States v. Wakeman, 25 M.J. 644 (A.C.M.R. 1987).

11 *Conforti*, 26 M.J. at 855.

12 *Id.* at 856.

13 *See White*, 23 M.J. at 859; *Conforti*, 26 M.J. at 855.

14 *Bowen*, 29 M.J. at 780.

15 *Id.*

16 *Id.*

of the convening authority's action as it pertains to forfeitures?; and 2) Was the convening authority's action in this case proper? Turning to the first issue, the court observed:

> R.C.M. 1003(b)(2) pertains to authorized punishments which may be adjudged by a court-martial and not to actions by the convening authority in acting upon sentences imposed by courts-martial. Indeed, the plain language of the rule renders its requirements inapplicable when total forfeitures are adjudged. Instead, the provisions of R.C.M. 1107 must be applied to determine the propriety of the convening authority's action.[17]

The court continued its analysis by noting that while the "action on [a] sentence is 'within the sole discretion of the convening authority' and is 'a matter of command prerogative,'"[18] the convening authority's exercise of such discretionary power is limited. "'The convening or higher authority may not increase the punishment imposed by a court-martial.'"[19] The court also noted that "'[w]hen mitigating forfeitures, the duration and amounts of forfeiture may be changed as long as the total amount forfeited is not increased and neither the amount nor duration of the forfeitures exceeds the jurisdiction of the court-martial.'"[20] The court then explained that, as a final limitation, "[i]f the ... action is 'incomplete, ambiguous, or contains clerical error,' this court, acting pursuant to Article 66, UCMJ, may instruct him (the convening authority) 'to withdraw the original action and substitute a corrected action.'"[21]

Applying R.C.M. 1107, the court perceived "no reason to set aside or otherwise modify the convening authority's action" because "[t]he total amount of forfeitures was not increased nor was the duration extended beyond some time period specified in the sentence adjudged by the court-martial or its jurisdictional limits."[22] The court also found that the approved sentence was not "ambiguous" because it failed "to specify the number of months the forfeitures ... [would] last."[23] "To the contrary, the duration of forfeitures is quite specific: the date the discharge is executed."[24] The court cited two cases, *United States v. Rios*[25] and *United States v. Smith*,[26] in support of this determination and opined:

> Although this would have been unknown at the time the action was taken by the convening authority, it is "susceptible of ready conversion into a definite period, and [is] not invalid because it did not itself recite, as recommended by the Manual, the specific number of months the forfeiture was to remain in effect."[27]

As additional support, the court noted that "[t]he holding in *Rios* is based on one of the Court's earliest opinions on this issue in which it held that an approved sentence to 'forfeiture of fifty ($50) per month during the period of confinement and until release therefrom' was not uncertain."[28] The court upheld the convening authority's action and concluded that the action did not evidence an abuse of discretion.[29]

Analysis

The Army court in *Bowen* correctly determined that the convening authority's action with respect to forfeitures is governed by R.C.M. 1107, not R.C.M. 1003(b)(2). Pursuant to R.C.M. 1107(g), the court also correctly concluded that the convening authority's action to approve forfeitures of "$447.00 pay per month until the discharge is executed" is not ambiguous, but is "quite specific: the date the discharge is executed."[30] The court's reliance on *Rios* and *Smith* for the proposition that the action is not uncertain because it is "'susceptible of ready conversion into a definite period'"[31] is, at best, misplaced and tenuous. Furthermore, the length of time a forfeiture will last pending the execution of a punitive discharge is not "'susceptible of ready conversion into a definite period.'"[32]

In *Smith* the court-martial sentenced the accused, *inter alia*, "'to be confined at hard labor for one year, and to forfeit all pay and allowances *during confinement and until release therefrom*.'"[33] The sentence as approved by the convening authority included "confinement at hard labor for four (4) months, and forfeiture of fifty dollars ($50) per month during the period of confinement and

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[17] *Id.*

[18] *Id.* (quoting R.C.M. 1107(b)(1)).

[19] *Id.* (quoting R.C.M. 1107(d)(1)).

[20] *Id.* at 780-81 (quoting R.C.M. 1107(d)(1) discussion).

[21] *Id.* at 781 (quoting R.C.M. 1107(g)).

[22] *Id.*

[23] *Id.*

[24] *Id.*

[25] United States v. Rios, 35 C.M.R. 88 (C.M.A. 1964).

[26] United States v. Smith, 12 C.M.R. 92 (C.M.A. 1953).

[27] *Bowen*, 29 M.J. at 781 (quoting *Rios*, 35 C.M.R. at 90).

[28] *Id.* (quoting *Smith*, 12 C.M.R. at 95).

[29] *Id.*

[30] *Id.*

[31] *Id.* (quoting *Rios*, 35 C.M.R. at 90).

[32] *Id.*

[33] *Smith*, 12 C.M.R. at 94 (emphasis in original).

until release therefrom."[34] The court upheld both the original sentence and the convening authority's action as to forfeitures. The court reasoned that the duration of the forfeitures was not uncertain because that duration could not exceed the period of confinement as originally adjudged or as reduced by the convening authority.[35] In *Rios* the court affirmed an adjudged sentence that included "confinement at hard labor for six months" and a forfeiture of "$50.00 for a like period."[36] The court reasoned that, as in *Smith*, the forfeiture provision was not uncertain because the duration of forfeitures is "susceptible of ready conversion into a definite period."[37] In both *Smith* and *Rios* the duration of forfeitures was "susceptible of ready conversion into a definite period" only because the language expressing those durations clearly referenced the respective periods of confinement. No such benchmark exists in the facts of *Bowen* from which to determine with certainty the duration of forfeitures. In deciding *Bowen*, the court simply relies on two cases that are easily distinguishable to conclude, without further explanation, that a duration of forfeitures that lasts "until such time as the bad-conduct discharge is executed" is "'susceptible of ready conversion into a definite period.'"[38]

Such a duration of forfeitures is not so readily convertible into a definite period. Article 71, Uniform Code of Military Justice (UCMJ),[39] precludes execution of a punitive discharge pending appellate review.[40] Where appellate review is waived or the appeal is withdrawn, article 71, UCMJ, precludes execution of the punitive discharge until the case is reviewed by a judge advocate.[41] In either event, duration of forfeitures can be ascertained only after-the-fact. Thus, such a duration is in fact uncertain and dependent for its determination upon the occurrence of certain future events.

Suggestions

In testing the convening authority's action for ambiguity, the analysis should focus on whether the action clearly expresses the event or contingency that tolls the running of forfeitures and not upon whether the duration of forfeitures is capable of ready conversion to a definite time period. A court-martial must adjudge a sentence to partial forfeitures with certainty as to amounts and durations. Such a requirement serves more than just facilitating financial bookkeeping.[42] If the amounts and durations as adjudged are ambiguous, it becomes impossible to determine whether any subsequent action by the convening or higher authority has impermissibly increased the punishment. Nevertheless, no similar purpose is served by holding the convening authority's action to the same requirement. Where the court-martial adjudges a forfeiture of all pay and allowances, any subsequent action by the convening authority to mitigate this sentence can never impermissibly increase the duration of forfeitures. The Army court has correctly determined that the convening authority is not constrained by R.C.M. 1003(b)(2). Why then should the convening authority's action be tested by the same standard applied in determining the propriety of a sentence adjudged by a court-martial, when the need for applying that standard does not exist?

Conclusion

When testing the convening authority's action for ambiguity, an appellate court's analysis should focus upon whether the action clearly expresses the event or contingency that tolls the running of the forfeitures, regardless of whether the duration specified is capable of ready conversion to a definite time period. Of primary importance, *Bowen* establishes that any action taken by the convening authority on forfeitures must be analyzed pursuant to R.C.M. 1107, not R.C.M. 1003(b)(2). To this extent, *Bowen* has significant precedential value.

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[34] *Smith*, 12 C.M.R. at 94.

[35] *See Smith*, 12 C.M.R. 92.

[36] *Rios*, 35 C.M.R. at 89.

[37] *Id.* at 90.

[38] *See Bowen*, 29 M.J. at 781.

[39] 10 U.S.C. § 871 (1982).

[40] 10 U.S.C. § 871(c)(1). Article 71(c)(1) provides in relevant part:

> If a sentence extends to ... a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is not waived, and an appeal is not withdrawn ... that part of the sentence extending to ... a dishonorable or bad-conduct discharge may not be executed until there is a final judgment as to the legality of the proceedings. A judgment as to legality of the proceedings is final in such cases when review is completed by a Court of Military Review and ....

Id.

[41] 10 U.S.C. § 871(c)(2). Article 71 (c)(2) provides in relevant part:

> If a sentence extends to ... a dishonorable or bad-conduct discharge and if the right of the accused to appellate review is waived, or an appeal is withdrawn ... that part of the sentence extending to ... a bad-conduct or dishonorable discharge may not be executed until review of the case by a judge advocate ... is completed.

Id.

[42] *See* United States v. Gilgallon, 2 C.M.R. 170 (C.M.A. 1952) (purpose of requiring that partial forfeitures adjudged by a court-martial be clearly expressed is "to simplify bookkeeping and eliminate the necessity of having an administrative officer compute the exact amount of the forfeiture assessed").

Regulatory Law Office Note

Telecommunications Service

This decade has seen many changes in the technology and regulation of the telecommunications business. The march of technology and regulatory change promises future challenges for the communications officer and his or her lawyer. Pursuant to AR 27-40, the Regulatory Law Office (JALS-RL) represents the consumer interest of the Army in this rapidly evolving environment. In order to appreciate the gravamen of changes in public policy and technology, Army attorneys must understand the basic scheme of economic regulation.

With the passage of the Communications Act of 1934, 47 U.S.C. § 151 *et seq.*, the regulation of interstate common carriers in the telecommunications industry devolved to the Federal Communications Commission (FCC). As part of its statutory mandate, the FCC regulates interstate carriers providing such services as telephone, telegraph, cellular radio, and long distance microwave communications. State regulatory commissions consider matters involving intrastate telecommunications services. Historically, and unlike other regulated services, these services were priced by state regulators and utilities based upon value, rather than upon cost of service. Such pricing was fostered by a goal of an all-encompassing national communications network, i.e., "universal service," as set forth in the Communications Act and as actively encouraged by both the FCC and the state regulators. This goal encouraged the engineering of highly compatible systems and encouraged vertical integration of corporate organization. Moreover, revenues derived in dense, low-cost markets, where the value of service was high, subsidized service to higher-cost markets that placed no premium upon the value of service. Also, the pricing of services rendered to business and other large users, such as the Army, was premised on subsidizing residential users. This approach to regulation maximized the number of customers subscribing to telephone service, promoting "universal service."

Although rate-making at the FCC has been cost-based for over twenty years, three recent changes augur for a closer nexus of pricing with the cost of service at the state level. Deregulation has played a role. Additionally, the corporate reorganization of a large segment of the industry has created more competition. Finally, changes in technology have made pricing cost-sensitive.

The FCC acted to deregulate the pricing of customer premises equipment in 1980. *Re Second Computer Inquiry*, Docket No. 20828, 77 F.C.C. 2d 384, 35 PUR 4th 143, 250 (1980). In the years since deregulation, the market for customer premises equipment has become highly competitive. The consumer no longer is required to use the equipment supplied by the utility. Consumers may acquire cheaper equipment or equipment tailored more precisely to their needs. This change has altered the stream of revenues recovered by telephone utilities.

Prior to this partial deregulation, extra revenues derived from the highly profitable rental of customer premises equipment helped to keep local exchange rates at lower levels. Now, the consumer has a wider range of choices of equipment of various manufacture and design at competitive prices. Local exchange carriers once had little competition in selling advertising in their "yellow pages." Extra revenues derived from this highly profitable business were applied by regulators as revenues of the local exchange. In a deregulated environment, competing firms are offering "yellow pages" advertising at competitive prices in some cities. Deregulation of "inside wiring" on the customers premises offers the potential for a wider range of firms to provide equipment, maintenance, and repair services to the consumer.

Such competition will undoubtedly be reflected in prices and will include competition for military business. Of special interest to soldiers are changes in the provision of coin-operated telephones on installations. In the past, the local exchange company had a monopoly on this service. This service will be coordinated primarily through the Army-Air Force Exchange System (AAFES) in the future. AAFES has pending requests for proposals related to this service. Competitive bidding will undoubtedly result in quality service to the soldier at fairer prices. Deregulation of certain activities of telephone utilities as discussed above must be viewed separately from antitrust actions or actions that increase competition between communications common carriers in the regulated market place.

A second change in the industry was the break-up of the "Bell System" on January 1, 1984. This was a corporate reorganization arising from resolution of the antitrust case, *United States v. Western Electric Company and American Telephone and Telegraph Company*, 552 F. Supp. 131 (D.D.C. 1982), *aff'd, Maryland v. United States*, 460 U.S. 1001 (1983). American Telephone & Telegraph Company (AT&T) was permitted to remain an interstate common carrier and retain its research and manufacturing facilities. AT&T was ordered by Judge Harold H. Greene to spin-off its local exchange assets to seven Regional Bell Operating Companies (RBOCs), which are separate operating corporations from AT&T and from each other. Each one of these seven RBOCs is now the corporate parent of several of the former Bell System Operating Companies which continue to provide local exchange service. The divestiture of the local exchange companies did permit AT&T to enter the competitive computer business, which prior antitrust orders had restricted. The seven regional firms, whose subsidiary telephone companies are offering local exchange service, are permitted competitive activities that do not abuse the local exchange monopoly.

Court action has fostered "line of business" competition in the rendering of local exchange service and other activities among the seven regional companies divested by AT&T. *United States v. Western Electric Company, et al.*, 627 F. Supp. 1090 (D.D.C. 1986), *rev'd*, 797 F.2d 1082 (D.C. Cir. 1986). Competition in this market with independent telephone utilities has also increased. The FCC

has fostered a competitive environment for AT&T and the other interstate carriers. In the meanwhile, the seven RBOCs have sought to compete with their former parent (AT&T) and the other carriers in portions of the interstate market for long distance service.

It is highly unlikely that other vertically integrated corporate entities in the telecommunications industry will follow the lead of AT&T and divest local exchange operations. The AT&T situation reflected a unique dominance of the industry at both the interstate and intrastate levels. Some portions of the industry appear to be restructuring along different lines. For instance, GTE Corp. acquired the long distance telecommunications (SPRINT) subsidiary of the Southern Pacific Railroad. Recently, SPRINT has become U.S. SPRINT, a result of merger between CONTEL (Continental Telephone Company) and COMSAT. These dramatic changes in the corporate structure of the industry have a variety of impacts in the regulatory arenas.

While the FCC finds itself regulating interstate carriers seeking to compete with lower rates, state regulators may face a different situation. Since 1952, allocation of revenues derived from interstate toll service has tended to keep rates for local exchange service (intrastate service) at lower levels. The consumer of interstate service subsidized the consumer using local exchange service. This was called the "Ozark Plan" of allocating revenues and costs between interstate and state services. By 1981, approximately twenty-six percent of local exchange plant and equipment costs were being apportioned to the interstate service for recovery of revenues. The object of this course of action in regulated rate-making was to achieve "universal service" through cross-subsidization.

Since the divestiture of AT&T and the Bell System, regulators have faced a restructured industry and a need to help the local exchange companies recoup the lost revenues occasioned by the mandated divestiture. A transition scheme using "access charges" has been adopted by the FCC to help local exchange service consumers by requiring a contribution by interstate carriers for access to the local network. *MTS-WATS Market Structure, Third Report and Order, Access Order*, F.C.C. Docket No. 78-72, 93 F.C.C. 2d 241 (1983), *aff'd, National Association of Regulatory Utility Commissioners v. F.C.C.*, 737 F.2d 1095 (D.C. Cir. 1984), *cert. denied*, 105 S. Ct. 1224 (1985). Changing technology and other factors will undoubtedly mitigate the need in the future for access charges as the local exchange carriers adopt to the shock of lost revenues.

As suggested earlier, different rates are often assessed different consumers for essentially the same telephone service. A private residential line is assessed one rate, whereas similar telephone service to a merchant, hotel, or military office is assessed a higher business or private line rate. In the past, this disparity has been encouraged and permitted by the regulators as being in the interest of universal service. The high rates assessed for business private lines have induced some larger consumers to invest in their own facilities or to get needed communications services from an alternative supplier in the now highly competitive market. Such larger users now have the opportunities, legal and technological, to "bypass" the local exchange utility for a portion of their usage. Where new facilities have costs that are below the actual costs of service of the local exchange utility, such diversion of traffic is "economic bypass." Where "bypass" costs exceed the costs of the local exchange utility and are induced only by the rates, such diversion is "uneconomic bypass." Both bypass phenomena have appeared in the regulated market place. When some customers are driven to bypass the local exchange because of rate imbalances, the remaining customers may have to absorb the loss of revenues in higher rates. This impacts the residential and small business users the most because they are the very customers who do not realistically have the option of bypass and whose rates historically have been artificially subsidized. The state regulators are caught in the quandary of having to acquiesce in reducing the business class subsidies to the smaller users or risk the real threat of such large users "bypassing" and leaving the smaller users with the lost revenues to make up in the form of higher rates. Thus, the forces of competition, deregulation, divestiture, etc., result in rate moderation particularly for large users and the encouragement of ever more rapidly developing technology—which benefits every one.

An example of a partial "bypass" would include the purchase and installation by a large customer of its own private branch exchange (PBX) equipment instead of continuing to lease such equipment. Alternatively, the large customer could continue to lease its PBX, but from a different supplier than the local exchange carrier. Either of these options in this example represent bypass permitted by the new legal environment of existing technology. To be sure, changes in depreciation rates for tax purposes under the Tax Reform Act of 1986, Public Law 99-514, will affect some consumers' decisions related to investing in hardware. Nevertheless, the threat of bypass is real and *is* taking place.

As suggested earlier, "bypass" of the local exchange carrier is also encouraged by the alternatives created by technology. Cellular radio is such a technology. Cellular radio is an integral part of modern mobile telephone technology and has been described as local exchange service. The courts have permitted competition among the seven regional companies of the former "Bell System" in cellular radio. *United States v. Western Electric Company, et al.*, 578 F. Supp. 643 (D.D.C. 1983). Independent firms are active competitors, too. While the existing local exchange (wire) carriers are getting into cellular radio, this technology may develop a competing local exchange network. There are many unanswered questions with these new technologies.

Not only does the developing fiber optic technology advance the state of the art in the whole field of telecommunications, but it enhances the ability of competitors in the field to provide an ever more sophisticated array of services at the lowest prices, which in turn encourages more competition and is likely to lead to more technological evolution and revolution. Fiber optic technology can already handle telephone computer, cable television, and

other signals transmitted on light waves. This innovation is drawing the particular interest of large firms considering bypass. For instance, the transportation conglomerate CSX will build a fiber optic network along some of its railway lines (Seaboard and L&N) with its new partner, Southern New England Telephone and Telegraph Company. Electric utilities such as Minnesota Power & Light Company are experimenting with fiber optic "riders" on existing powerlines to facilitate remote meter reading by computer. Whether the electric utilities will evolve into a large communications network using fiber optics is uncertain. Needless to say, while state and federal regulators are elated by the onslaught of technological development occasioned by the advent of competition, they are very concerned about the bypass alternatives to the local exchange that may be promoted by technology.

Technological innovation has produced savings to the consumer of telecommunications services in the past. It is doing so today and undoubtedly will do so in the future. In the absence of innovation, rates would be higher.

Pricing of the great bulk of telecommunications services occurs in rate cases before state and federal regulatory commissions. That pricing determination is called rate design. Failure to properly design rates in the new telecommunications environment may cause a utility to lose business for a portion of its services. Falling revenues would precipitate a further rate increase request and the downward financial spiral would continue. Few issues, perhaps none, have greater importance to the consumer than rate design.

The broad rate design area addresses the allocation of revenues between rate classes, i.e., the different services offered by a utility. Rate design focuses on the specific revenue requirement of a specific rate class or tariff, and it determines the manner in which the rate will be structured to produce the projected revenue level with some certainty. Consideration is given to the elasticity of demand for the service, competition, cross-overs between rates, new technologies, and other factors that may affect consumer decisionmaking. Some services may be priced on a flat monthly charge, while others may be more appropriately priced based upon usage. Obviously, economics expertise is required to properly make and fully analyze the rates, costs, etc. Rational decisionmaking also requires engineering expertise to anticipate the impact of available or future technology, and the manner in which a given rate structure may operationally affect the utility.

Expert witnesses who present such evidence on behalf of the telephone companies do not have the consumer interest of military installations as their primary concern. Nevertheless, there are experts in telephone rate design who can perform studies to be offered as evidence on behalf of large users of telecommunications services, such as military installations. For instance, the Regulatory Law Office has an accountant on its staff who has participated as a rate design witness in telephone cases. Also, the Defense Communication Agency (DCA) has an economist on its staff who has been made available to the Regulatory Law Office to present rate design testimony on economic issues. These internal resources are limited, however, and are supplemented *ad hoc*.

The Regulatory Law Office has worked with DCA, the General Services Administration (GSA), other military departments, and involved Army commands in many cases involving telecommunications rate design. In a number of these proceedings, funding was provided by affected users to enable the Regulatory Law Office to retain outside expert witnesses. This has proven to be an extremely valuable means of presenting evidence in support of the consumer interest of the specific military installation(s). This effort can be substantially assisted by concerned installation personnel who identify the specific regulated telecommunications service or services that are used by the installation and the specific utility that provides the service. Often billings from the utility contain this information. After determining the types of services that are used by the installation and some relative scale of the amount of billings for each service, an expert can conduct a study separating the relevant services and their costs from the overall utility cost of service. Separation and identification of these costs enables the expert to present a cost based rate design. The Regulatory Law Office has sponsored such expert rate design testimony most recently before the regulatory bodies in such states as Washington, Texas, Missouri, California, Colorado, Illinois.

Both procurement of telecommunications services and rate cases before regulatory commissions will continue to challenge the communications officer and his or her lawyers. Concerned personnel at installations are encouraged to report any rate filings made by local telephone utilities to the Regulatory Law Office in accord with AR 27-40.

Clerk of Court Note

Article 69(b) Application Forms

Defense counsel, please don't use the wrong form "Application for Relief from Court-Martial Findings and/or Sentence Under the Provisions of Title 10, United States Code, Section 869," (Whew! Should we offer a prize for the first person to find a DA Form with a longer title?) The August 1984 edition of that form (DA Form 3499) is the correct form. As it says at the bottom of the first page, "Edition of May 69 is Obsolete." Indeed it is. Please don't use it. Instead, obtain a supply and use the August 1984 edition.

TJAGSA Practice Notes

Instructors, The Judge Advocate General's School

Criminal Law Notes

The Defense Counsel's Duty to Deliver Evidence Implicating a Client

The Air Force Court of Military Review recently addressed an issue of first impression in the military justice system: "[T]o what extent is an attorney, in possession of evidence that incriminates his client obligated to submit it to the prosecution *sua sponte*?"[1] Master Sergeant (MSgt) Robert Rhea was convicted of numerous sexual offenses against his stepdaughter. Part of the evidence used to convict MSgt Rhea was a calendar on which his stepdaughter recorded the dates of six episodes of sexual intercourse that she had with MSgt Rhea. MSgt Rhea had agreed that he would buy his stepdaughter a stereo if she engaged in the six sexual episodes with him. The calendar came into the possession of the prosecution directly from the two defense counsel.[2] Why would the defense counsel give the prosecution evidence that implicated their client?

A review of an attorney's ethical obligations reveals the following: "A lawyer shall not *unlawfully obstruct* another party's access to evidence *or unlawfully* alter, destroy, or *conceal* a document or other *material having potential evidentiary value*. A lawyer shall not counsel or assist another person to do any such act."[3] The question becomes: When is it unlawful for the defense counsel to conceal potentially incriminating evidence? Military defense counsel should be aware that possessing evidence that implicates their clients may be unlawful under article 134 of the Uniform Code of Military Justice.[4] Certainly, if the evidence is contraband, the defense counsel has no right to possess the contraband. Also, if the attorney knowingly receives stolen property, the attorney may not lawfully possess or conceal the evidence. But, what if the evidence does not fit into one of these categories? In MSgt Rhea's case, the calendar was neither stolen property nor contraband. The comment to the ethical rule is not much help in clarifying this issue: "A lawyer who receives (i.e., in the lawyer's physical possession) an item of physical evidence implicating the client in criminal conduct shall disclose the location of or shall deliver that item to proper authorities *when required by law or court order.*"[5] Were MSgt Rhea's counsel required by law to deliver the calendar to proper authorities?

After the allegations arose against MSgt Rhea, his stepdaughter moved out of his house and left several personal items behind. After learning of the stepdaughter's allegations, the defense counsel directed MSgt Rhea to gather his stepdaughter's documents, letters, books, and similar items that she had left behind so that counsel might examine them to determine why the stepdaughter was making the allegations. Later, during the pretrial investigation of the case, the stepdaughter mentioned that she had recorded the six episodes of sexual intercourse with MSgt Rhea on a calendar she had kept in her room. After hearing the stepdaughter's story, the defense counsel searched the materials that MSgt Rhea had gathered. Among the items, the counsel discovered the calendar that she had described.[6] Concerned that they now possessed evidence of a crime, the defense counsel sought ethics opinions from their state bars, Virginia and Idaho. The Standing Committee on Legal Ethics of the Virginia State Bar opined that the question of whether the defense counsel had a legal duty to produce the calendar was beyond its providence.[7] Receiving no real help from their state bars, the defense counsel went *ex parte* to the military judge.[8] Upon learning of the situation, the trial judge issued the defense counsel an order to turn the calendar over to the government.[9] Under Army Rule 3.4, the counsel, having received a court order, were now "off the hook." The Air Force court did not rest its ruling on Rule 3.4, however. Instead, it relied on federal

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[1] United States v. Rhea, ACM 27563, slip op. at 3 (A.F.C.M.R. 19 Jan. 1990).

[2] *Rhea*, slip op. at 4.

[3] Dep't of Army, Pam. 27-26, Legal Services: Rules of Professional Conduct for Lawyers, Rule 3.4(a) (31 Dec. 1987) (emphasis added) [hereinafter Army Rule].

[4] Uniform Code of Military Justice art. 134, 10 U.S.C. § 934 (1982) [hereinafter UCMJ]. Potential offenses under article 134 include obstruction of justice; destruction, removal, or disposal of property to prevent seizure; or knowingly receiving or concealing stolen property.

[5] Army Rule 3.4 comment (emphasis added).

[6] *Rhea*, slip op. at 4.

[7] Standing Committee on Legal Ethics, Virginia State Bar, Legal Ethics Opinion No. 1049 (2 Mar. 1988).

[8] The *Rhea* court specifically held that a military judge has the inherent power to resolve ethical issues confronting counsel in a pending case. Also, the court expressly approved of the defense counsel's *ex parte* conversation with the military judge in the case. Two trial defense counsel were originally on the case. Both wrote their state bars for assistance in the matter. Virginia responded as indicated. The other counsel was a member of the Idaho bar. The Air Force Court of Military Review indicated that both state organizations suggested that a ruling be sought from the judge; however, having read the Virginia opinion, this author can discern no such suggestion.

[9] *Rhea*, slip op. at 4. Thereafter, the original defense counsel withdrew from the case and the military judge recused himself from further participation in the case.

and state case law to hold that the calendar was not privileged attorney-client communication. "The 'attorney-client' privilege prevents a lawyer from being compelled to produce a client's document which predates the attorney-client relationship only *if* the client himself would be privileged from producing the document."[10] Because the calendar belonged to the stepdaughter and the notations on the calendar were hers and not the client's, fifth amendment self-incrimination issues were not involved, and the calendar could have lawfully been seized from the client or from the attorney. In fact, the court indicated that "the legal obligation of a defense counsel who comes into possession of physical evidence related to a criminal case should be self-executing, and a court order should not be required to enforce it."[11]

What does *Rhea* mean for the Army practitioner? It affirms, by implication, Army Rule 3.4 and the comments contained to Rule 3.4. Additionally, *Rhea* reiterates the prevailing view of other jurisdictions as to what a defense counsel must do when confronted with evidence implicating a client. A brief summary of the prevailing view of the defense counsel's obligations follows:

> 1. The physical evidence itself is not privileged from disclosure by the attorney-client privilege.
> 2. The fact of the delivery of the evidence to the lawyer from the defendant or that the attorney was the source to the police, however, remains privileged and cannot be mentioned by the prosecutor unless waived or the defense handling of the evidence affects its verity.
> 3. Defense counsel may keep the physical evidence for analysis for a reasonable period before turning it over to the police if its verity is not altered and if it does not hinder the apprehension, conviction, or punishment of another.[12]

Of course, the best advice that can be given to the defense counsel is not to accept the item. If possession becomes unavoidable, the defense counsel should turn the evidence over to the proper authority. Turn-in should be done in a way to best protect the client's interests, including his or her identity. Further, our ethical rules indicate, "[t]he appropriate disposition of such physical evidence is a proper subject to discuss confidentially with a supervisory attorney."[13] MAJ Holland.

Constructive Enlistment: Applicable to Reserve Component Active Duty Training

In *United States v. Russo*[14] the United States Court of Military Appeals held that the combination of a regulatory defect and recruiter misconduct voided Private Russo's enlistment, thereby depriving the military of *in personam* jurisdiction over Russo. In 1979, to overcome jurisdictional defects in cases such as *Russo*, Congress amended article 2 of the Uniform Code of Military Justice[15] by adding subsection (c), which codified the concept of constructive enlistment. Article 2(c), UCMJ, provides that

> [n]otwithstanding any other provision of law, a person serving with an armed force who — (1) submitted voluntarily to military authority; (2) met the minimum age and competency requirements ... at the time of voluntary submission to military authority; (3) received military pay and allowances; and (4) performed military duties, is subject [to courts-martial jurisdiction] until such person's active service has been terminated in accordance with law ....[16]

Now, even if an individual's enlistment is defective in some manner, article 2(c) will allow the military to exercise court-martial jurisdiction over the individual if the four prerequisites are met.

In *United States v. Ernest*[17] the Air Force Court of Military Review faced the issue of whether article 2(c), UCMJ, could provide a basis for obtaining *in personam* jurisdiction over a reservist performing active duty training. Lieutenant Colonel (LTC) Ernest performed three separate active duty training tours in 1988. In each incident of training, however, his unit failed to follow Air Force directives when bringing LTC Ernest onto active duty.[18] During the first two periods of active duty training, LTC Ernest applied for and received military pay, reserve points, and per diem pay for the active duty. During the third period of active duty training, LTC Ernest was apprehended at his duty station for drug offenses that he had committed during all three periods of his active duty training. Thereafter, the Air Force kept him in an active duty status from the time of his apprehension until the date of his trial. Although entitled to military pay, reserve points, and per diem pay for the third period of active duty training, LTC Ernest never applied for, nor received, the entitlements.[19]

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[10] *Id.*, slip op. at 6.

[11] *Id.*

[12] J. Hall, Jr., Professional Responsibility of the Criminal Lawyer § 10.53 (1987) (citations omitted).

[13] Army Rule 3.4 comment.

[14] 1 M.J. 134 (C.M.A. 1975).

[15] UCMJ art. 2, 10 U.S.C. § 802 (1982).

[16] UCMJ art. 2(c).

[17] ACM 27241 (A.F.C.M.R. 1 Feb. 1990)

[18] *Id.*, slip op. at 3.

[19] *Id.*, slip op. at 2.

While awaiting his court-martial, however, LTC Ernest "regularly requested and received per diem payment advances."[20]

The court in *Ernest* held: "The plain language of Article 2(c) leads us to conclude that the military services have personal jurisdiction over individuals, *including reserve personnel,* who meet the subsection (c) criteria, regardless of any regulatory violations which might occur during the process of bringing such personnel onto active duty."[21] Thus, another vehicle apparently is available for courts-martial to acquire personal jurisdiction over reservists. The *Ernest* case serves as a tacit reminder that article 2(c), UCMJ, should not be overlooked when dealing with jurisdictional issues.

In *Ernest* the Air Force did not trigger the relatively new involuntary activation provisions for trying reservists by courts-martial under article 2(d), UCMJ. Because the Air Force took action with a view toward trial against LTC Ernest while he was on active duty training, jurisdiction continued over him.[22] Again, this approach should serve as a gentle reminder that the 1986 amendments to article 2, UCMJ, regarding jurisdiction over members of the Reserve components, need not be the only means to acquire court-martial jurisdiction over reservists. When seeking to try a reservist by court-martial, the command may find it less burdensome to avoid the procedural requirements for the involuntary activation procedures of article 2(d) by taking action with a view toward trial while the reservist is on active duty. MAJ Holland.

Mistake of Fact and Sex Offenses

A little over a year ago, a TJAGSA Practice Note[23] discussed several appellate court decisions applying the mistake of fact defense[24] to various crimes under the UCMJ.[25] As this discussion illustrated, the application of the defense depends upon the nature of the offense charged or, more precisely, upon the mental state required for the element of the offense at issue.[26] As a more recent decision by the Army Court of Military Review demonstrates, applying the defense is often complex and sometimes open to several interpretations.

In *United States v. Langley*[27] the accused was convicted of one specification of assault with intent to commit rape.[28] The court's opinion does not discuss any of the circumstances surrounding the offense.[29] The evidence apparently raised the mistake of fact defense (presumably as to the victim's consent) because the military judge instructed upon it prior to the members' deliberations on findings. The judge specifically advised that in order for the accused to be entitled to the defense, his mistake must be both honest and reasonable. The defense contended the judge erred, arguing that the accused's mistake need only be honest.

The Army Court of Military Review affirmed the accused's conviction in *Langley,* concluding that the accused's mistake of fact, as applied to the charged assault with intent to commit rape, must be both honest and reasonable to constitute a defense. Upon closer examination, however, the result in *Langley* can be criticized as applying an incorrect standard for the defense in that case.

At least since 1984, military law has recognized that an honest and reasonable mistake of fact as to the victim's consent can operate as a defense to rape.[30] This application of the defense makes sense because the consent ele-

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[20] *Id.*

[21] *Id.*, slip op. at 4 (emphasis added).

[22] *Id.*; Manual for Courts-Martial, United States, 1984, Rule for Courts-Martial 202(c) [hereinafter MCM, 1984, and R.C.M., respectively]; United States v. Fitzpatrick, 14 M.J. 394 (C.M.A. 1983); United States v. Self, 13 M.J. 132 (C.M.A. 1982).

[23] TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense,* The Army Lawyer, Feb. 1989, at 66.

[24] MCM, 1984, R.C.M. 916(j) provides:

> *Ignorance of mistake of fact.* Except as otherwise provided in this subsection, it is a defense to an offense that the accused held, as a result of ignorance or mistake, an incorrect belief of the true circumstances such that, if the circumstances were as the accused believed them, the accused would not be guilty of the offense. If the ignorance or mistake goes to an element requiring premeditation, specific intent, willfulness, or knowledge of a particular fact, the ignorance or mistake need only have existed in the mind of the accused. If the ignorance or mistake goes to any other element requiring only general intent or knowledge, the ignorance or mistake must have existed in the mind of the accused and must have been reasonable under all the circumstances. However, if the accused's knowledge or intent is immaterial as to an element, then ignorance or mistake is not a defense.

[25] 10 U.S.C. § 801-940 (1982).

[26] Specifically, whether an accused can avail himself of the mistake of fact defense will turn on whether the element at issue of the charged crime is a specific intent element, a general intent element, a strict liability element, or an element requiring some other, "intermediate," criminal state of mind. For specific examples of these different applications of the defense, see TJAGSA Practice Note, *supra* note 23, at 66-67.

[27] ACMR 8801826 (A.C.M.R. 26 Jan. 1990).

[28] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 64.

[29] The only factual discussion involves the accused's earlier consumption of alcohol in connection with a potential voluntary intoxication defense. *Langley,* slip op. at 2.

[30] A violation of UCMJ art. 120. In United States v. Carr, 18 M.J. 297 (C.M.A. 1984), the Court of Military Appeals held that mistake of fact as to the victim's consent can operate as a defense to rape. *Id.* at 301-02; *accord* United States v. Taylor, 26 M.J. 127, 128 (C.M.A. 1988); *see generally* Wilkins, *Mistake of Fact: A Defense to Rape,* The Army Lawyer, Dec. 1987, at 4. Earlier cases avoided the issue, finding that the requirement the victim make her lack of consent reasonably manifest adequately covered any possible mistake of fact. *E.g.*, United States v. Steele, 43 C.M.R. 845 (A.C.M.R. 1971).

ment, in the context of a rape charge, requires only a general criminal intent.

The defense applies differently in the case of attempted rape,[31] which is a specific intent offense. As the Air Force Court of Military Review observed last year in *United States v. Daniels*:[32]

> Although rape is a general intent offense, the lesser included offense of attempted rape is a specific intent offense. The military judge correctly instructed the members that, in order to find appellant guilty of attempted rape, they must find beyond a reasonable doubt that "the act was done with the specific intent to commit the offense of rape" and that at the time of the act "the accused intended *every* element of rape."[33]

The Air Force court concluded that, "clearly, the mistake of fact as to consent [in attempted rape] goes directly to an element requiring specific intent."[34]

Several years earlier, in *United States v. Polk*,[35] the Army Court of Military Review reached the same conclusion—that only an honest mistake of fact as to the victim's consent is required for attempted rape. In support of its decision in *Polk*, the Army court compared the offenses of attempted rape and assault with intent to commit rape. The court found that "[a]ttempt to rape and assault with intent to commit rape are, under nearly all circumstances, as in the present case, substantially identical. The specific intent required is the same for either offense."[36] The Court of Military Appeals has likewise recognized that "the sexual intent is the same for both" attempted rape and assault with intent to commit rape,[37] and that the two crimes are "essentially the same offense."[38]

Consistent with *Polk*, the present Manual provides that "[i]n assault with intent to commit rape, the accused must have intended to overcome any resistance by force, and to complete the offense. Any lesser intent will not suffice."[39] Put a slightly different way, military law requires that in order for the accused to be guilty of assault with intent to commit rape, he must specifically intend to rape the victim. This specific intent to rape necessarily includes a specific intent to have nonconsensual sexual intercourse, by force and *without consent*, with a woman other than one's wife.[40] Other appellate authorities have similarly concluded that, where an accused is charged with a type of intentional aggravated assault, he must specifically intend to perpetrate the underlying offense inclusive of all its elements.[41]

The court in *Langley* did not discuss or distinguish any of this authority. It instead relied upon *United States v. McFarlin*,[42] favorably quoting the following language from that decision:

> Even though indecent assault is a specific intent offense, the applicable standard is an honest *and reasonable* mistake. This is because the mistake in question did not relate to *appellant's* intent but rather to another element, the presence or absence of the victim's consent.... Thus the concept of reasonableness enters our equation twice: first as the measure of the required probative value of the evidence tending to show appellant's mistaken belief; and second as one of the required attributes of the sort of mistaken belief which that evidence must tend to show, *i.e.*, a belief which was not only honestly but reasonably held.[43]

The court's reliance on *McFarlin* is misplaced. Unlike assault with intent to commit rape, the specific intent requirement for indecent assault is limited to a single element of that offense: "the intent to gratify the lust or sexual desires of the accused."[44] Accordingly, an honest mistake of fact could operate as a defense only to that element of indecent assault. Any mistake as to the other "general intent" elements of indecent assault, including the victim's lack of consent, must be both honest and reasonable to amount to a defense.

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[31] A violation of UCMJ art. 80; *see* MCM, 1984, Part IV, para. 4.

[32] 28 M.J. 743 (A.F.C.M.R. 1989).

[33] *Daniels*, 28 M.J. at 747-48 (emphasis in original) (citing MCM, 1984, Part IV, paras. 4b(2) & c(1); Dep't of Army, Pam. 27-9, Military Judges' Benchbook, para. 3-2b (May 1980)).

[34] *Daniels*, 28 M.J. at 748.

[35] 48 C.M.R. 993 (A.C.M.R. 1974).

[36] *Id.* at 996.

[37] United States v. Hobbs, 23 C.M.R. 157, 162 (C.M.A. 1957).

[38] United States v. Gibson, 11 M.J. 435, 436 (C.M.A. 1981).

[39] MCM, 1984, Part IV, para. 64c(4).

[40] *See* MCM, 1984, Part IV, para. 45b(1).

[41] For example, in United States v. Mitchell, 2 C.M.R. 448 (A.B.R. 1952), the board concluded that the accused must specifically intend to kill in order to be guilty of assault with intent to commit murder. Similarly, in United States v. Sasser, 29 C.M.R. 314 (C.M.A. 1960), the Court of Military Appeals concluded that the accused must specifically intend to inflict grievous bodily harm when charged with assault with intentionally inflicting grievous bodily harm.

[42] 19 M.J. 790 (A.C.M.R.), *pet. denied*, 20 M.J. 314 (C.M.A. 1985).

[43] *Id.* at 793-94 (emphasis in original) (citations omitted) (quoted in *Langley*, slip op. at 3-4).

[44] MCM, 1984, Part IV, para. 63b(2); United States v. Jackson, 31 C.M.R. 738 (A.B.R. 1962); *see also* United States v. Birch, 13 M.J. 847 (C.G.C.M.R. 1982) (kissing victim against her will without evidence of specific intent to gratify lust or sexual desires of the accused constituted only a battery).

Langley raises a final issue: What, if any, practical differences exist between attempted rape and assault with intent to commit rape? The Court of Military Appeals has recognized that in virtually every case the two offenses would be multiplicious for all purposes and should not be charged separately.[45] Although subtle distinctions between these crimes may theoretically exist,[46] the Court of Military Appeals has acknowledged that "it is difficult indeed to conjure up a hypothetical situation to support [distinguishing between the two crimes] where the intended offense is rape."[47] Moreover, the maximum punishment for both offenses is identical.[48] Perhaps the most significant difference between the offenses relates to the application of the voluntary abandonment defense, which has been recognized for attempt offenses,[49] but rejected for intentional assaults.[50] Even this distinction is uncertain, however, as the court has not recently addressed whether voluntary abandonment can act as a defense to intentional assaults. MAJ Milhizer.

The Scope of Assault

Two recent decisions by the Army Court of Military Review address several issues pertaining to assault under article 128[51] and related crimes. These decisions are instructive in defining the scope of the offense under military law and the underlying legal theories upon which it is based. They also raise several important questions.

In *United States v. Bonano-Torres*[52] the accused was convicted, *inter alia*, of assault by battery by kissing the victim on the lips and by attempting to unbutton her blouse.[53] The evidence reflects that the accused, a married noncommissioned officer, went on an overnight pay mission with the victim, a female finance clerk who was assigned to assist him.[54] After their duties had been completed, the accused and the victim had dinner, went to a discotheque, and then returned to their hotel (where they had taken separate rooms) and played cards. During the course of the evening, the accused attempted to kiss the victim, but she moved away from him. Later, when the accused managed to kiss the victim, she told him that "they should not do this."[55] The victim reminded the accused that he was a married man and explained that she had a trusting relationship with her boyfriend that she did not want to jeopardize. The victim told the accused to leave the room, but then relented and continued playing cards with him. The accused thereafter kissed the victim a second time and unsuccessfully attempted to unbutton her blouse.[56]

The court had no difficulty in affirming the accused's conviction for assault by battery based upon the second kiss. Under military law, a battery is "an assault in which the attempt or offer to do bodily harm is consummated by the infliction of that harm."[57] The unlawful touching must be the result of an intentional or culpably negligent act.[58] Any offensive touching will suffice,[59] even where no physical injury is inflicted. The court found in *Bonano-Torres* that the accused was clearly on notice that, at the time of the second kiss, his intentional advances were

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[45] *See Gibson*, 11 M.J. at 436-37.

[46] The Manual provides:

> An assault with intent to commit any of the offenses mentioned above [including rape] is not necessarily the equivalent of an attempt to commit the intended offense, for an assault can be committed with intent to commit an offense without achieving that proximity to consummation of an intended offense which is essential to an attempt.

MCM, 1984, Part IV, para. 64c(1); *see* Legal and Legislative Basis, Manual for Courts-Martial, United States, 1951, at 296. The Court of Military Appeals observed that "there is authority that every assault with intent to rape is an attempt, but that the converse does not follow." *Hobbs*, 23 C.M.R. at 162.

[47] *Hobbs*, 23 C.M.R. at 162. For example, assume the accused tricks the victim into entering an isolated trailer where he has cut the phone lines and blocked all means of escape, with the specific intent of raping her. These and other overt acts could go beyond mere preparation and thus form the basis for an attempted rape charge, even though no assault was ever inflicted or offered. Nevertheless, this misconduct by the accused coupled with his specific intent would constitute assault with intent to commit rape under an attempt theory. Thus, it appears that every assault with intent to commit rape, if alleged under an attempt theory, would constitute an attempted rape. On the other hand, an accused could conceivably assault a victim intending to rape her, and yet the assault might not amount to a sufficient overt act for attempted rape. *See generally* United States v. Presto, 24 M.J. 350 (C.M.A. 1987); United States v. Byrd, 24 M.J. 286 (C.M.A. 1987) (substantial step test for determining whether an overt act extends beyond mere preparation).

[48] The maximum punishment for both attempted rape and assault with intent to commit rape is a dishonorable discharge, forfeiture of all pay and allowances, and confinement for 20 years. *See* MCM, 1984, Part IV, paras. 4e and 45e(1) (attempted rape); *id.*, Part IV, para. 64e(1) (assault with intent to commit rape).

[49] *Byrd*, 24 M.J. at 292-93 (opinion of Everett, C.J.) ("the affirmative defense of voluntary abandonment must be recognized in military practice" for attempt offenses).

[50] MCM, 1984, Part IV, para. 64c(4) ("Once an assault with intent to commit rape is made, it is no defense that the accused voluntarily desisted.").

[51] UCMJ art. 128.

[52] 29 M.J. 845 (A.C.M.R. 1989).

[53] *Id.* at 849.

[54] *Id.* at 847.

[55] *Id.*

[56] Prior to the second kiss, the victim refused the accused's suggestion that they lay together on the bed. *Id.*

[57] MCM, 1984, Part IV, para. 54c(2)(a).

[58] *See* United States v. Turner, 11 M.J. 784 (A.C.M.R. 1981); MCM, 1984, Part IV, para. 54c(2)(d) ("If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery.").

[59] *See* United States v. Stewart, 29 M.J. 92 (C.M.A. 1989) (transmitting the AIDS virus to the victim by unprotected and unwarned sex); United States v. Van Beek, 47 C.M.R. 99 (A.C.M.R. 1973) (touching the victim with a noxious and persistent gas).

unwelcomed[60] and could be considered offensive.[61] The court concluded, therefore, that his misconduct satisfied the elements of assault by battery.[62]

The court, however, did not find the evidence sufficient to support the accused's conviction for assault by battery for attempting to unbutton the victim's blouse.[63] The court concluded, "In view of the fact that [the accused] did not touch [the victim's] person but only her blouse and the button, we find that such act was not a battery and not part of the assault and battery committed upon her person as required by Article 128, UCMJ."[64]

Regardless of whether the result in *Bonano-Torres* is correct under the particular circumstances of that case, the decision should not be broadly construed to stand for the proposition that the accused must physically touch the victim's person to be guilty of assault by battery. Military law has long recognized that a battery may be inflicted either directly or indirectly.[65] Indeed, the Manual specifically notes that "[i]t may be a battery to spit on another, push a third person against another, set a dog at another which bites the person, ... shoot a person, cause a person to take poison, or drive an automobile into a person."[66] More to the point, the Manual instructs that a battery can be constituted when an accused "cut[s] another's clothes while the person is wearing them though without touching or intending to touch the person."[67] The gravamen of assault by battery is whether the accused caused the victim to be offensively touched, and not whether the touching was perpetrated by the accused directly upon the victim's body.[68]

Assault by battery is one of the three forms of simple assault recognized by military law.[69] Several forms of aggravated assault—each of which must be premised upon a type of simple assault—are also proscribed by the UCMJ.[70] In the second recent Army case, *United States v. McGhee*,[71] the court discusses a common form of aggravated assault (assault with a means likely to produce death or grievous bodily harm) and its relationship to other crimes of violence.

The accused in *McGhee* was convicted, *inter alia*, of involuntary manslaughter[72] by culpable negligence for the

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[60]Military law has long held that consent will not always operate as a defense to an assault by battery. For example, both parties to a mutual affray are guilty of assault. United States v. O'Neal, 36 C.M.R. 189 (C.M.A. 1966); *see generally* TJAGSA Practice Note, *Assault and Mutual Affrays*, The Army Lawyer, July 1989, at 40. Moreover, consent will be disallowed as a defense to assault by battery when the injury is more than trifling or there is a breach to the public order. United States v. Holmes, 24 C.M.R. 762 (A.F.B.R. 1957); *see* United States v. Dumford, 28 M.J. 836, 839 (A.F.C.M.R. 1989); United States v. Johnson, 27 M.J. 798, 803 (A.F.C.M.R. 1988) (consent by the accused's sex partner rejected as a defense for aggravated assault by having "unsafe" sex where the accused knew he had the AIDS virus). A consensual kiss certainly does rise to the aggravated degree of harm required by *Holmes* and, in any event, would not be offensive.

[61]*Bonano-Torres*, 29 M.J. at 849.

[62]*See generally* MCM, 1984, Part IV. para. 54b(2).

[63]*Bonano-Torres*, 29 M.J. at 849.

[64]*Id.* The court acknowledged that the accused's actions might "be evidence of his intent to commit an indecent assault, an offense not charged." *Bonano-Torres*, 29 M.J. at 849; *see* MCM, 1984, Part IV, para. 63 (indecent assault). Assault consummated by a battery is a lesser included offense of indecent assault. *Id.*, Part IV, para. 65d(1). Therefore, assault by battery under an attempt theory might be supported by the evidence as construed by the court. The court did not pursue this basis for affirming the accused's conviction for attempting to unbutton the victim's blouse, perhaps because the specification failed to provide notice of the attempt theory and the proof at trial focused upon an offer or a battery theory.

[65]MCM, 1984, Part IV, para. 54c(2)(b). The Manual illustrates this point by noting that "a battery can be committed by inflicting bodily injury on a person through striking the horse on which the person is mounted causing the horse to throw the person, as well as by striking the person directly." *Id.*

[66]*Id.*, Part IV, para. 54c(2)(c).

[67]*Id.*

[68]The accused in *Bonano-Torres* was also convicted of rape of a second victim. The court reversed that conviction, finding that the victim's testimony that she passively submitted to having sexual intercourse with the accused so he would quit harassing her was not sufficient resistance, under the circumstances, to establish guilt. *Bonano-Torres*, 29 M.J. at 850-51 (citing United States v. Williamson, 24 M.J. 32 (C.M.A. 1987) and United States v. Carr, 18 M.J. 297, 299 (C.M.A. 1984)). The court did recognize, however, that the accused could be guilty of an indecent assault for his initial acts with the victim and yet not be guilty of rape for the later intercourse. *See* United States v. Wilson, 13 M.J. 247 (C.M.A. 1982); United States v. Perry, 22 M.J. 669 (A.C.M.R. 1986). The court was not convinced beyond a reasonable doubt that the accused was guilty of this lesser offense, however, apparently finding that the accused may have had an honest and reasonable mistake of fact as to the victim's consent. *Bonano-Torres*, 29 M.J. at 851 (citing United States v. Steele, 43 C.M.R. 845, 849-50 (A.C.M.R. 1971) (Finklestein, J., concurring)); *see generally* TJAGSA Practice Note, *Recent Applications of the Mistake of Fact Defense*, The Army Lawyer, Feb. 1989, at 66.

[69]Military decisional law recognizes three forms of simple assault: offer, attempt, and battery. *E.g.*, *Turner*, 11 M.J. 784 (A.C.M.R. 1981); *see* MCM, 1984, Part IV, para. 54c(2)(d) ("If bodily harm is inflicted unintentionally and without culpable negligence, there is no battery."). For a general discussion of these theories of assault, see MCM, 1984, Part IV, para. 54c(1) & (2). Interestingly, a strict reading of article 128(a) suggests that only two forms of simple assault are recognized: offer and attempt. "Any person subject to this chapter who *attempts* or *offers* with unlawful force or violence to do bodily harm to another person, whether or not the *attempt* or *offer* is consummated, is guilty of assault and shall be punished as a court-martial may direct." UCMJ art. 128a (emphasis added). Whether a distinct theory of assault by battery—absent an offer or attempt—should be recognized under military law is beyond the scope of this note.

[70]*See, e.g.*, UCMJ art. 90(1) (assault upon a superior commissioned officer), art. 91(1) (assault upon a warrant, noncommissioned, or petty officer), art. 128(b) (assault with a dangerous weapon or other force likely to produce grievous bodily harm; and assault by intentionally inflicting grievous bodily harm), and art. 134 (indecent assault; and assault with the intent to commit certain specified crimes).

[71]29 M.J. 840 (A.C.M.R. 1989).

[72]A violation of UCMJ art. 119(2).

death of her daughter, age five.[73] The evidence reflects that the accused left her daughter in the care of her boyfriend, an Army sergeant, knowing that her boyfriend had two months earlier punched the girl in the stomach.[74] On the later occasion, the boyfriend again punched the child in the stomach, this time causing her to die.[75]

The court first determined that the accused's conviction for involuntary manslaughter could not be affirmed because the specification failed to allege that death was a reasonably foreseeable consequence of the accused's actions.[76] The court next concluded that negligent homicide[77] could not be affirmed as a lesser included offense; the court found that it had a reasonable doubt whether the past acts of child abuse by the boyfriend constituted a "pattern of abuse [which] portended death."[78]

The court did find, however, that it could affirm the accused's conviction for the lesser included offense of aggravated assault[79] premised upon a battery theory. Specifically, the court concluded the accused was "guilty of aggravated assault through her gross neglect in leaving her daughter with her boyfriend who was likely to inflict grievous bodily harm upon her daughter."[80]

McGhee is instructive in the manner that it contrasts these three offenses—involuntary manslaughter by culpable negligence, negligent homicide, and aggravated assault by a means likely—based upon the degree of harm risked and the probability of the harm actually occurring. For involuntary manslaughter under a culpable negligence theory, the degree of harm risked must be high (death) and the probability of the harm occurring must be great (a reasonably foreseeable consequence). For negligent homicide, the degree of harm risked is equally high (death), but the probability of the harm occurring is comparatively less (a natural and foreseeable consequence). For aggravated assault by a means likely, the degree of harm risked may be lesser (serious bodily injury or death), but the probability of the harm occurring must be great (likely).

The President's judgment regarding the comparative aggravating character of these three offenses, as measured by the maximum punishment authorized for each, further refines this analysis. Where the potential harm is great, but the risk is comparatively low (negligent homicide), the maximum punishment includes a bad-conduct discharge and confinement for one year.[81] Where the risk is high, but the potential harm may be comparatively less (aggravated assault by a means likely), the maximum punishment includes a dishonorable discharge and confinement for three years.[82] The maximum punishment is surprisingly the same, however, when both the potential harm *and* the risk are high (involuntary manslaughter by culpable negligence).[83] In fact, an aggravated assault by a means likely,

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[73] *McGhee*, 29 M.J. at 841. The accused was also convicted of maiming her son, age six, in violation of article 124, UCMJ. As to this offense, the court in *McGhee* affirmed the accused's conviction for the lesser offense of aggravated assault. *Id.* at 842.

[74] *Id.* at 841-42.

[75] The punch ruptured her small intestine, leading to peritonitis and shock, which resulted in death within 24 hours. *Id.* at 841.

[76] The specification alleged that the accused was culpably negligent "by failing to protect her [daughter] from the physical abuse of [the] Sergeant ..., a failure [the accused] knew might foreseeably result in life-threatening injury to [her daughter]." Quoted in *id.* at 842. The court concluded on appeal that this standard was "less exacting than that prescribed by the manual," which requires that "'death' had to be reasonably foreseeable." *Id.*; *see* United States v. Henderson, 23 M.J. 77 (C.M.A. 1986) (involuntary manslaughter for the drug-overdose death of another); *see generally* Milhizer, *Involuntary Manslaughter and Drug-Overdose Deaths: A Proposed Methodology*, The Army Lawyer, Mar. 1989, at 10.

[77] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 85.

[78] *McGhee*, 29 M.J. at 841. Interestingly, the elements for negligent homicide do not expressly impose a requirement that the victim's death be foreseeable to the accused, as opposed to serious injury being foreseeable but death occurring. The elements for negligent homicide are as follows:

> (1) That a certain person is dead;
>
> (2) That this death resulted from the act or failure to act of the accused;
>
> (3) That the killing by the accused was unlawful;
>
> (4) That the act or failure to act of the accused which caused the death amounted to simple negligence; and
>
> (5) That, under the circumstances, the conduct of the accused was to the prejudice of good order and discipline in the armed forces or was of a nature to bring discredit upon the armed forces. MCM, 1984, Part IV, para. 85b.

Of course, the requirement that death be foreseeable is arguably implied from other elements: that is, the fourth element (simple negligence in this context requires that death be foreseeable), or the fifth element (prejudicial or service discrediting misconduct in this context requires that death be foreseeable). The court in *McGhee*, however, wrote that it derived this specific foreseeability requirement from United States v. Perez, 15 M.J. 585 (A.C.M.R. 1983). In *Perez* the court affirmed the accused's conviction for negligent homicide of her daughter, who died of injuries sustained while in the care of the accused's boyfriend. The accused had been previously counselled not to leave the child with the boyfriend, as the child had twice before sustained serious injuries while in his care. When the accused was unexpectedly called to duty, she again left her child with her boyfriend. The child later died of injuries inflicted by the boyfriend. For a discussion of the criminality of the accused's actions in *Perez*, see Milhizer, *Necessity and the Military Justice System: A Proposed Special Defense*, 121 Mil. L. Rev. 95, 107 (1988).

[79] Specifically, assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm. UCMJ art. 128(b)(1).

[80] *McGhee*, 29 M.J. at 842.

[81] MCM, 1984, Part IV, para. 85e.

[82] *Id.*, Part IV, para. 54e(8)(b).

[83] *Id.*, Part IV, para. 44e(2).

if committed with a firearm, exposes the offender to more than twice the potential confinement than he would face for an involuntary manslaughter caused by the same firearm.[84] The only rational explanation of this punishment scheme is that, although the probability of harm needed for involuntary manslaughter by culpable negligence is greater than that needed for negligent homicide, it is not as great as that needed for aggravated assault by a means likely. Put another way, "a means likely" is more probable than "a reasonably foreseeable consequence."[85]

As these cases illustrate, the many forms of assault under military law are complex and confusing. Indeed, a variety of complicated legal and factual questions commonly arise in assault cases. This complexity and confusion is further compounded by the interrelationship of the many forms of assault to other violent crimes. Given the frequency of assault charges both tried at courts-martial and handled by nonjudicial punishment,[86] it is incumbent upon trial practitioners in the military to acquire a firm understanding of this offense. MAJ Milhizer.

Judge's Incorrect Ruling is Correctly Affirmed

A recent decision by the Army Court of Military Review addresses one of the special requirements for proving false swearing[87] and certain other falsification offenses under military law.[88] Additionally, this decision highlights how an improperly denied motion for a finding of not guilty[89] can be saved by evidence admitted later in the trial.

In *United States v. Yates*[90] the accused was convicted, *inter alia*, of making a false statement by denying that he committed adultery with a Mrs. M.[91] The government's case on the merits consisted of Mrs. M's testimony that she had committed adultery with the accused and a sworn statement by the accused given before trial that his relationship with Mrs. M was merely social. The defense moved for a finding of not guilty at the conclusion of the government's case, contending that the government had failed to prove the false swearing charge.

The defense motion for a finding of not guilty was based upon one of the several unusual requirements of proof for false swearing and certain other falsification offenses under military law.[92] The motion was premised on the following specific requirement: "The falsity of the statement cannot be proved by the testimony of a single witness unless that testimony directly contradicts the statement and is corroborated by other evidence, either direct or circumstantial, tending to prove the falsity of the statement."[93]

The defense in *Yates* argued, in essence, that the only evidence on the issue of the falsity of the accused's statement, besides Mrs. M's testimony alleging adultery, was the accused's pretrial admission. This admission, however, merely corroborated that a *social relationship* had developed between the accused and Mrs. M. The defense thus asserted that the contradictory statement by Mrs. M had not been sufficiently corroborated for purposes of the two-witness rule. The military judge denied the motion, believing instead that the issue was one of fact to be decided on the basis of witness credibility. The judge indicated that he would later instruct the members accordingly.[94]

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[84] *Compare* id., Part IV, para. 54e(8)(a) (eight years of confinement for aggravated assault with a firearm), *with id.*, Part IV, para. 44e(2) (three years of confinement for involuntary manslaughter with a firearm).

[85] The issue of how likely is likely, when used in the context of assault by a means likely, has never been comprehensively addressed by the military's appellate courts. *See Johnson*, 27 M.J. at 803; *see generally Stewart*, 29 M.J. at 93.

[86] *See* UCMJ art. 15.

[87] A violation of UCMJ art. 134; *see* MCM, 1984, Part IV, para. 79.

[88] For example, perjury and false swearing have several identical proof requirements under military law. MCM, 1984, Part IV, paras. 57c and 79c. In fact, the Manual incorporates by reference many of the special proof requirements of perjury for false swearing. For a discussion of the falsification offenses under the UCMJ that have special proof requirements, see Hall, *The Two-Witness Rule in Falsification Offenses: Going, Going, But Still Not Gone*, The Army Lawyer, May 1989, at 11, 13-15. Another recent case, United States v. Byard, 29 M.J. 803 (A.C.M.R. 1989), reaffirmed the long-standing precedent that false swearing is not a lesser included offense of perjury. *Id.* at 810-11; *see* United States v. Smith, 26 C.M.R. 16 (C.M.A. 1958); United States v. Warble, 30 C.M.R. 839 (A.F.B.R. 1960).

[89] *See* R.C.M. 917.

[90] 29 M.J. 888 (A.C.M.R. 1989). The Army Court of Military Review had previously set aside the findings of guilty and the sentence because of a lack of jurisdiction. United States v. Yates, 25 M.J. 582 (A.C.M.R. 1985). The case was later reversed and remanded by the Court of Military Appeals. United States v. Yates, 28 M.J. 60 (C.M.A. 1989).

[91] *Id.* The accused was also convicted of adultery in violation of article 134 of the UCMJ. *See* MCM, 1984, Part IV, para. 62. Note that the "exculpatory no" doctrine does not apply to false swearing, and thus was unavailable to the accused in *Yates*. United States v. Gay, 24 M.J. 304, 306 (C.M.A. 1987).

[92] For example, military law provides that the falsity of the statement at issue in a false swearing or perjury case "cannot be proved by circumstantial evidence alone, except with respect to matter which by their nature are not susceptible of direct proof." MCM, 1984, Part IV, para. 57c(2)(c). For a discussion of this requirement as recently applied by the Army Court of Military Review, see TJAGSA Practice Note, *Using Circumstantial Evidence to Prove False Swearing*, The Army Lawyer, Jan. 1990, at 36 (discussing United States v. Veal, 29 M.J. 600 (A.C.M.R. 1989)); *see also* United States v. Walker, 19 C.M.R. 284 (C.M.A. 1955).

[93] MCM, 1984, Part IV, para. 57c(2)(c). Congress eliminated the two-witness rule in federal courts and grand jury proceedings with the passage of Title IV of the Organized Crime Act of 1970. 10 U.S.C. § 1623 (1982); *see generally* Hall, *supra* note 88, at 15 (discusses the federal civilian approach to the two-witness rule for falsification offenses). In its place, Congress adopted a "beyond a reasonable doubt" standard of proof for these offenses. This statute, however, has not been made applicable to the military. *See* United States v. Lowman, 50 C.M.R. 749 (A.C.M.R. 1975).

[94] The military judge's instructions on this matter are extracted in the court's opinion in *Yates*. *Yates*, 29 M.J. at 889. For a good discussion of issues pertaining to instructing upon the two-witness rule, see Hall, *supra* note 88, at 16-17.

The two-witness rule undeniably places an additional requirement upon the government in proving certain falsification offenses. This requirement can be met, of course, when the government has multiple witnesses to prove the falsity of the accused's statement.[95] As noted above, it can likewise be satisfied with only a single witness, when the witness directly contradicts the accused's statement and is supported by other direct or circumstantial evidence.[96] One commentator has noted that "[t]his is a relatively light burden for the government to bear because the level of proof needed for corroboration is simply whether or not the independent evidence is inconsistent with the innocence of the accused."[97]

The evidence on the merits presented by the government in *Yates*—the testimony of Mrs. M. and the accused's pretrial statement—falls short of satisfying the special proof requirement for false swearing discussed above. Granted, the testimony by Mrs. M directly contradicts the alleged false swearing by the accused, and thus this threshold aspect of the special proof requirement is satisfied.[98] The pretrial admission by the accused, however, fails to provide the necessary corroboration for Mrs. M's testimony. The accused's admission, wherein he acknowledges having only a social relationship with Mrs. M, does not corroborate the falsity of the charged statement in which he denies that his relationship with Mrs. M was adulterous.[99] Although the accused's pretrial admission was not inconsistent with Mrs. M's testimony, neither was it inconsistent with his innocence.[100] It was, in short, too ambiguous to satisfy the requirement for corroboration.

The defense motion for a finding of not guilty in *Yates* was made pursuant to R.C.M. 917(a), which provides in part:

> The military judge, on a motion by the accused or sua sponte, shall enter a finding of not guilty of one or more offenses charged after the evidence on either side is closed and before findings on the general issue of guilt are announced if the evidence is insufficient to sustain a conviction of the offense affected.[101]

Had the military judge correctly evaluated the government's limited evidence pursuant to the applicable standard for a finding of not guilty,[102] the defense motion would have been granted and the case against Major Yates would have been dismissed.

The Army Court of Military Review, however, did not expressly address whether the military judge erred by denying the defense motion for a finding of not guilty. Instead, the appellate court apparently relied upon R.C.M. 917(g).[103] This rule provides that a trial judge's denied motion for a finding of not guilty will not be set aside on appeal when evidence that cures evidentiary defects is introduced subsequent to the motion, but prior to findings.[104]

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[95] *E.g.*, *Lowman*, 50 C.M.R. 749 (A.C.M.R. 1975).

[96] MCM, 1984, Part IV, para. 57c(2)(c); *see* United States v. Guerra, 32 C.M.R. 463 (C.M.A. 1963) (the source of the directly contradictory statement must be someone other than the accused). This rationale was extended in United States v. Tunstall, 24 M.J. 235 (C.M.A. 1987). In that case, two witnesses directly contradicted distinct portions of the accused's statement. The court concluded:

> Therefore, where the alleged false oath relates to two or more facts and one witness contradicts the accused as to one fact and another witness as to another fact, the two witnesses corroborate each other in the fact that the accused swore falsely, and their testimony will authorize a conviction.

Tunstall, 24 M.J. at 237 (quoting Goins v. Commonwealth, 167 Ky. 603, 181 S.W. 184, 186 (1916)); *accord* May v. United States, 280 F.2d 555, 558-61 (6th Cir. 1960); *see* United States v. Maultasch, 596 F.2d 19 (2d Cir. 1979).

[97] Hall, *supra* note 88, at 15 (citing United States v. Jordan, 20 M.J. 977, 979 (A.C.M.R. 1985)). Other exceptions to the two-witness rule, based upon the accused's acknowledgement of the particular types of documents used, are likewise discussed in the Manual. MCM, 1984, Part IV, para. 57c(2)(c); *see* Hall, *supra* note 88, at 16.

[98] *See Guerra*, 32 C.M.R. at 467-69 (testimony which is merely inconsistent but not directly contradictory is insufficient). Moreover, the special proof requirements for false swearing apparently permit the accused's own words to serve as the corroborating evidence that supports the directly contradictory statement of another witness. *Id.* at 469.

[99] The elements of proof for adultery under military law include, *inter alia*, that "the accused wrongfully had sexual intercourse with a certain person." MCM, 1984, Part IV, para. 62b(1); *see generally* United States v. Hickson, 22 M.J. 146 (C.M.A. 1986). Clearly, all social relationships between men and women who are married, but not to each other, do not involve conduct that satisfies this element.

[100] *See* United States v. Buckner, 118 F.2d 468, 469 (2d Cir. 1941) (cited in *Jordan*, 20 M.J. at 979) ("the falsity of the statement charged to be perjured must be established either by two independent witnesses, or by one witness who is supported by independent evidence that is 'inconsistent with the innocence of the defendant'").

[101] The rule requires that the motion "specifically indicate wherein the evidence is insufficient." R.C.M. 917(b). Each party should be given an opportunity to be heard on the motion, R.C.M. 917(c); and the military judge has the discretion to permit the government to reopen its case. R.C.M. 917(c) discussion; *see* United States v. Ray, 26 M.J. 468 (C.M.A. 1988).

[102] R.C.M. 917(d) states the standard for a motion for a finding of not guilty as follows:

> A motion for a finding of not guilty shall be granted only in the absence of some evidence which, together with all reasonable inferences and applicable presumptions, could reasonably tend to establish every essential element of an offense charged. The evidence shall be viewed in the light most favorable to the prosecution, without an evaluation of the credibility of witnesses.

[103] The court's opinion in *Yates* does not expressly mention R.C.M. 917(g) or its standard for appellate review.

[104] R.C.M. 917(g) provides:

> *Effect of denial on review.* If all the evidence admitted before findings, regardless by whom offered, is sufficient to sustain findings of guilty, the findings need not be set aside upon review solely because the motion for finding of not guilty should have been granted upon the state of the evidence when it was made.

The analysis to this subparagraph indicates that it is based upon the Manual for Courts-Martial, United States, 1969 (rev. ed.), para. 71*a*.

The appellate court opinion reflects that the members called two additional witnesses after the defense motion for a finding of not guilty, but prior to findings.[105] The appellate court considered this testimony, in conjunction with the government's evidence, in determining whether the evidence as a whole was sufficient to support the accused's guilt in light of the special proof requirements. The court concluded that the testimony of these witnesses "provided ample evidence to corroborate Mrs. M's testimony and afforded the court a sufficient basis for its finding of guilty."[106] Because of R.C.M. 917(g), the court did not have to evaluate whether the military judge's ruling was erroneous.[107]

This case carries with it important reminders for both trial and defense counsel. Both must remain aware of the special proof requirements for false swearing and other falsification offenses.[108] Additionally, after denial of a motion for a finding of not guilty, defense counsel must introduce evidence cautiously. Rule for Courts-Martial 917(g) makes clear that on appeal, when deciding if the government satisfied its burden of proof, an appellate court is not limited to the evidence introduced by the government prior to the defense motion for a finding of not guilty. Rather, the appellate court can consider all of the evidence introduced prior to findings. As a result, defense counsel must be careful not to cure the military judge's erroneous denial of a motion for a finding of not guilty. MAJ Milhizer and CPT Cuculic.

Legal Assistance Items

The following notes have been prepared to advise legal assistance attorneys of current developments in the law and in legal assistance program policies. They also can be adapted for use as locally-published preventive law articles to alert soldiers and their families about legal problems and changes in the law. We welcome articles and notes for inclusion in this portion of *The Army Lawyer*; submissions should be sent to The Judge Advocate General's School, ATTN: JAGS-ADA-LA, Charlottesville, VA 22903-1781.

Family Law Notes

Adoption Reimbursement Program

The Department of Defense test program for adoption expense reimbursement[109] has been extended to include adoption proceedings initiated after September 30, 1987, and before October 1, 1990.[110] The program originally was scheduled to end on September 30, 1989; this amendment therefore adds an additional year.

The National Defense Authorization Act for Fiscal Years 1990 and 1991[111] included one other significant change to the program. Now, members of the Coast Guard are entitled to reimbursement of qualified adoption expenses.[112] Congress directed the Secretary of Transportation to develop implementing regulations that will provide details for filing and processing requests for reimbursement.[113]

This change is not retroactive, however. For Coast Guard personnel, the reimbursement program applies only to adoption proceedings that are "initiated" after September 30, 1989, and before October 1, 1990. In this regard, note that an adoption proceeding is "initiated" on the date of the initial home study report or on the date the child is placed in the member's home for adoption, whichever event occurs later.[114]

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[105] *Yates*, 29 M.J. at 889. The record of trial establishes that the defense motion preceded the testimony of the additional witnesses. Information provided by the Defense Appellate Division, United States Army Legal Services Agency.

[106] *Id.* One witness, Mrs. W, testified to the following: 1) that she accompanied Mrs. M to the accused's home on three occasions; 2) that the accused, during one of these visits, offered to allow Mrs. M to live with him temporarily; 3) that Mrs. M had told her that she was having an affair with the accused; and 4) that Mrs. M said that she was experiencing marital problems with her husband, Master Sergeant (MSG) M. The other witness, MSG M, testified as follows: 1) that he received an anonymous note which requested that he control his wife, because she was either at the accused's house or just leaving whenever the anonymous person tried to visit the accused; and 2) that his wife had admitted to him that she had three or more sexual encounters with the accused. *Id.* An obvious issue is raised as to whether the testimony by Mrs. W and MSG M, which in large part merely repeats prior statements by Mrs. M, can be employed to corroborate Mrs. M's testimony. Using a witness's prior statements to corroborate her contradictory testimony appears inconsistent with the purpose of the two-witness rule and the requirement for corroboration. *See Buckner*, 118 F.2d at 469 (the two witnesses must be independent or, alternatively, the single witness must be corroborated by independent evidence).

[107] *See* United States v. Buckner, 118 F.2d 468 (2d Cir. 1941); United States v. Bland, 653 F.2d 989 (5th Cir.), *cert. denied*, 454 U.S. 1055 (1981) (appellate courts are not limited to evidence admitted prior to motions for findings of not guilty; but rather, also may consider *defense* evidence).

[108] *See supra* notes 87-88 and accompanying text.

[109] National Defense Authorization Act for Fiscal Years 1988 and 1989, Pub. L. No. 100-180, § 638, 101 Stat. 1106 (1987). *See also* Dep't of Defense Directive 1341.4, Test Program for Reimbursement of Adoption Expenses (Oct. 5, 1988) [hereinafter DOD Dir. 1341.4]; TJAGSA Practice Note, *Adoption Expense Reimbursement Program*, The Army Lawyer, Dec. 1988, at 36.

[110] National Defense Authorization Act for Fiscal Years 1990 and 1991, Pub. L. No. 101-189, § 662, 103 Stat. 1465 (1989).

[111] *Id.*

[112] *Id.* § 662(a).

[113] *Id.*

[114] DOD Dir. 1341.4 (Encl. 1).

Experience under the reimbursement program has highlighted a significant health care problem that can arise. A child is not a "dependent" for military health care purposes until the adoption is final.[115] Thus, neither CHAMPUS coverage nor entitlement to care at a military treatment facility is available for a child who is placed in a soldier's home prior to the adoption being completed. In such cases, the prospective adoptive parent should consider enrolling the child in the Uniformed Services Voluntary Insurance Program (USVIP) until the adoption is final. Further information on this health care insurance program can be obtained from representatives of the Mutual of Omaha insurance company. MAJ Guilford.

Birth Certificates for Children Born Abroad

Occasionally, clients ask how to get copies of birth certificates for children born abroad. The mailing address for these documents is Department of State, Passport Services, 1425 K Street NW, Room 386, Washington D.C. 20522-1705. The cost is $4.00 per copy, payable by check made out to the Department of State. The signed request must include the child's full name, the date and place of birth, both parents' full names, the mother's maiden name, and the requester's daytime telephone number. For additional information, call (202) 326-6183/6184. MAJ Guilford.

International Child Abduction

Courts are beginning to decide cases that arise under the Convention on the Civil Aspects of International Child Abduction (the Convention)[116] and the International Child Abduction Remedies Act.[117] The few cases decided thus far suggest that these laws may indeed provide relief for victims of international child abduction.

For example, in a case out of California,[118] a divorced American mother who normally resided in the Canary Islands, Spain, brought her two children to California for a brief visit. She had authority to do so under a custody order issued by a Spanish court pursuant to her divorce from the children's father, a Spanish citizen. Once in the United States, however, she stayed with the children and concealed their whereabouts from the father.

Under the Spanish order, the parents had joint legal custody, and the mother had physical custody subject to the father's visitation rights. The order specifically allowed the mother to take the children to the United States, but only for one month. Thus, her retention of the children in the United States violated the custody order.

Nearly a year later, the father located the children. He then went into a California court and initiated an action for the children's return to the Canary Islands. The court first noted that the Convention applies in this case[119] and that it constitutes the supreme law of the land. It also had no difficulty determining that the mother's retention of the children was "wrongful" as the term is used in the Convention.[120] Her action violated an existing order that required the children's return to the Canary Islands.

The mother contested the matter by asserting that an order for the children's return would expose them to a grave risk of psychological harm, which is a defense recognized by the Convention.[121] The court appointed an expert to explore this issue and to examine the children's relationships with their mother and father. He concluded that at least one of the children would be harmed by a separation from the mother. He also noted that a return to Spain could adversely affect the children, but the likelihood of psychological damage would be greatly reduced if the mother returned with them and lived there. The mother testified that she would return to the Canary Islands if the court ordered the children's return.

On these facts, the court concluded that returning the children to Spain would not "expose" them to harm. Of course, some trauma is inevitable when children are abducted and moved around the world. Nevertheless, the court felt that returning the children to Spain would afford the Spanish courts an opportunity to decide what was in the children's best interests. Note the implicit message in this ruling: Spanish courts *should* be given the opportunity to rule in custody matters regarding these United States citizens.

As a final matter, the court applied the Convention rule that a party guilty of wrongful conduct may be required to pay the other party's attorneys' fees and transportation costs.[122] Thus, it ordered the mother to pay the father $5,000.

In addition to showing how the Convention can efficiently resolve international custody disputes, the case addressed several interesting issues. To start with, the court had to decide when the mother's conduct became wrongful. This is important because a victimized parent has a stronger case for the children's return if an action is

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[115] *See* 10 U.S.C. § 1072(2)(D) (1982); Army Reg. 640-3, Personnel Records and Identification of Individuals: Identification Cards, Tags, and Badges, para. 3-15*b*(6) and Table B-1 (17 Aug. 1984).

[116] Convention on the Civil Aspects of International Child Abduction, done at the Hague, October 25, 1980; *text reprinted at* 51 Fed. Reg. 10498 (1986) [hereinafter Hague Convention].

[117] Pub. L. No. 100-300, 102 Stat. 437 (1988), *to be codified at* 42 U.S.C. § 11601-11610.

[118] Navarro v. Bullock, No. 86481 (Cal. Super. Ct. Placer County Sept. 1, 1989).

[119] For the Convention to apply, both the country where the child ordinarily is resident and the country to which the child has been abducted must have ratified the Convention.

[120] *See* Hague Convention art.3.

[121] Hague Convention art. 13b.

[122] Hague Convention art.26.

brought within one year of a wrongful abduction.[123] Here, the action was brought more than a year after the children left Spain, but a few days less than a year after the date they were supposed to be returned.[124] The court decided that the abduction began only after the mother failed to return the children. This brought the plaintiff within the one-year rule.

The case involved another interesting problem that can arise under many custody decrees. Here, the mother had the right to physical custody, and the father had a right of visitation during vacations. The Spanish order also provided that the parties had joint legal custody.

Under the Convention, a plaintiff must show that he or she was exercising "rights of custody" at the time of the abduction.[125] "Custody" includes "rights relating to the care of the person of the child, and, in particular, the right to determine the child's place of residence."[126] Compare this to "rights of access," which means the right "to take the child for a limited period of time to a place other than the child's habitual residence."[127]

What "right of custody" was the father exercising at the time of the abduction? The court answered this question by observing that he had "exercised every scheduled visitation." But visitation is a merely a "right of access," not custody. Arguably, then, the court erroneously ruled that the father had standing to invoke the Convention.

Perhaps realizing that these facts presented a threshold problem, the court went on to observe that the mother's action would constitute a felony under state law. This, the court concluded, should put to rest any reservations about whether her actions were wrongful. "Wrongful" acts indeed are a prerequisite for relief, but they do not substitute for the separate requirement that the plaintiff was actually exercising rights of custody at the time of abduction.[128]

Still, the court probably reached the right result, even if the reasoning is not entirely clear. Joint legal custody usually confers on both parties a jointly-exercised right to make major decisions regarding the child's upbringing. Typically, choosing which country a child will live in is such a major decision. Thus, in this case the father did exercise "rights of custody" (i.e., "determin[ing] the child's place of residence")[129] by obtaining a court order that precluded the mother from unilaterally moving the children outside Spanish territory.

Custodial parents who seek the return of children from foreign countries can be heartened by cases such as this one. Judges appear willing to abide by the spirit that inspired the agreement without fretting about whether a foreign court will arrive at the "right" answer in a custody decision. On the other hand, clients who are contemplating escaping overseas with a child in violation of the other parent's custody rights should beware. The tactic is less likely to work than in the past, and, at the same time, it may trigger significant financial penalties. MAJ Guilford.

Mansell v. Mansell: An Epilogue

The Supreme Court's decision in *Mansell v. Mansell*[130] potentially affects every division of military retired pay.[131] The question now is whether it affects the division of *Major Mansell's* retired pay. Surprisingly, the answer appears to be "No."

As it reached the Supreme Court, the *Mansell* case focused on a legal issue that allowed the Court to eschew questions raised by the facts of the case. Major and Mrs. Mansell had divorced in California in 1979, after he had retired from the Air Force. Prior to entry of the decree, they executed a separation agreement that explicitly provided for division of the retired pay that Major Mansell waived in order to receive disability benefits from the Department of Veterans Affairs.[132] The divorce decree also called for the division of waived retired pay.

After enactment of the Uniformed Services Former Spouses' Protection Act (the Act)[133] in 1982, and long after his divorce decree had become final, Major Mansell started this action to challenge the part of the decree that awarded his former wife a share of the waived retired pay. He argued that under the language of the Act, states are preempted from dividing anything other than disposable

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[123] *See* Hague Convention art. 12 (if the action is brought within one year, the authorities "shall order the return of the child forthwith"; if the action is brought after more than one year, the authorities "shall order the return of the child, unless it is demonstrated that the child now is settled in its new environment").

[124] The children left the Canary Islands on August 1, 1988, for what was to be a one-month trip to California. The court order required their return not later than September 1, 1988. The father initiated the legal proceedings in California on August 23, 1989.

[125] Hague Convention art. 3b.

[126] Hague Convention art. 5a.

[127] Hague Convention art. 5b.

[128] Hague Convention art. 3.

[129] This is the essence of "rights of custody." *See* Hague Convention art. 5a; 51 Fed. Reg. 10503 (1986) (the Department of State's analysis of the Convention).

[130] 109 S. Ct. 2023 (1989).

[131] This is because the Court's dicta suggest that states cannot divide gross military retired pay but instead can divide only "disposable retired pay." *See* TJAGSA Practice Note, *McCarty and Preemption Revived: Mansell v. Mansell*, The Army Lawyer, Sept. 1989, at 30. This result overrules a substantial body of state case law. *Id.*

[132] 109 S. Ct. at 2025.

[133] 10 U.S.C. § 1408 (1982).

retired pay.[134] All this was to no avail, however; in an unreported decision, a California Court of Appeal ruled that his interpretation of the Act was erroneous. Major Mansell then petitioned the United States Supreme Court for certiorari. The Court heard the case and vindicated his view of the Act.[135] This would leave one to believe that Major Mansell had won. Unfortunately for him, however, the Supreme Court decision did not end the matter.

The case was remanded to California for further proceedings not inconsistent with the Court's ruling. In these further proceedings,[136] the California Court of Appeal again affirmed the trial court's refusal to vacate the original decree that divided the waived retired pay. It did so notwithstanding the Supreme Court's decision. How did this happen?

When Major Mansell's current law suit first reached the Court of Appeal, that court ruled solely on the merits of his preemption argument. This is the decision that the Supreme Court reviewed and reversed. The state court had not addressed the problems raised by the facts and the procedural posture of the matter.

Remember, however, that Major Mansell had signed a property settlement agreement prior to his divorce, and in that agreement he expressly agreed to a division of waived retired pay. Remember also that he initiated this litigation after his divorce decree had become final; the current case was a new action seeking a vacation of the original decree rather than an appeal of the original decree.

These facts could create adequate and independent state grounds for denying Major Mansell the relief he sought if they had been part of the Court of Appeal's rationale the first time around. After the Supreme Court's remand, the Court of Appeal did look at the issues raised by these facts. Not surprisingly, it concluded that Major Mansell's separation agreement constituted a waiver of his right to challenge the division of waived retired pay. It also ruled that *res judicata* attached to the divorce decree and served as a bar to Major Mansell's challenge.

Thus, Major Mansell won nothing, despite prevailing before the Supreme Court. Ironically, the Court's ruling has far-reaching consequences for everyone else. As noted above, it probably means that states no longer can divide gross retired pay. Perhaps more significantly, it has sparked the introduction of bills before Congress that are designed to address (actually, to reverse) the *Mansell* decision. Although it remains to be seen exactly how far any amendment of the Act will go,[137] it seems safe to predict that life will not be the same for any divorcing military couple after *Mansell*—except for the Mansells. MAJ Guilford.

Consumer Law Notes

Bereavement Air Fares

Most airlines have bereavement fares for anyone flying to visit a dying relative or to attend a funeral. If a coach seat is available on the requested flight, participating airlines usually charge the lowest coach fare available. If the lowest fare is a "super-saver" fare or other fare that has restrictions (such as advance purchase or a minimum stay), these restrictions will normally be waived.

Most airlines require proof of the illness or death. The name, address, and phone number of the attending physician, the hospital, or the funeral home will usually be sufficient. Also, many airlines require payment of the regular fare and then refund the difference between the regular fare and the lowest fare upon receipt of the required proof. There are no standard rules among the airlines, and you should exercise caution in selecting an airline. Some airlines do not provide a cash refund; instead, they issue travel vouchers that can be used only on another flight with that airline.

Because each airline handles these emergencies differently, soldiers should book the flight through the local SATO or a travel agent with a computerized reservation service who can quickly locate an available seat at the best rate. Additionally, commanders should be encouraged to include the required proof in block 30 of the DA Form 31, Request and Authority For Leave. Any verification provided by the local Red Cross office would also assist the soldier in getting the bereavement fare at the SATO. With verification by the unit commander and the Red Cross, some airlines will approve the bereavement fare immediately, thereby saving the soldier the trouble of requesting a refund later.[138] MAJ Dougall.

Credit Card Fraud

The Federal Trade Commission (FTC) has issued an alert to consumers concerning the growing problem of

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[134] This argument is based on the language of 10 U.S.C. § 1408(c)(1). For a fuller discussion of the issue, see TJAGSA Practice Note, *supra* note 131, at 30.

[135] The United States Supreme Court explicitly overruled the California Supreme Court on this point. 109 S. Ct. at 2025.

[136] Mansell v. Mansell, 216 Cal. App. 3d 937, 265 Cal. Rptr. 227 (1989).

[137] *See, e.g.*, Congressional Research Service, Report No. 86-100 F, *Military Benefits for Former Spouses: Legislation and Policy Issues* (1989). This report examines a number of possible changes to the Act, including elimination of the "disposable retired pay" language and a proposal to create a federal presumption of divisibility of military retired pay. The report also discusses legislative changes designed to address situations where a retired member is recalled to active duty and where a military retiree combines military service and federal civilian service to qualify for a higher civilian pension. The proposals first were initiated in 1985, but the *Mansell* case has heightened interest in these matters.

[138] This note is based on information obtained during a telephone conversation with a representative of the Air Transport Association and *"Bereavement" Air Fares*, Good Housekeeping, Feb. 1990, at 21.

credit card fraud.[139] One scheme involves the dishonest clerk who takes several impressions of a credit card or keeps the card number when taking an order. The clerk uses one impression or the number for the consumer's actual purchase, but then uses the other impressions or the number for illegal transactions. The second form of fraud occurs when a clerk or other employee retrieves discarded carbons of a charge slip and secures the consumer's card number.

The FTC warns that thieves are now using the telephone to advise unsuspecting consumers that they have just won a prize as the result of a drawing of charge card holders. The thieves inform the consumers that all they need to do is verify their prize by giving the caller a charge card number. Another scheme is a telephonic offer to a consumer to sell goods at unbelievably low prices if the consumers will charge the purchases by credit card.

The FTC recommends that consumers take the following precautions to prevent credit card fraud and theft:

1. Never give credit card numbers over the telephone, unless the consumer initiated the transaction with a reputable company;

2. Sign new credit cards when received and record card numbers, expiration dates, and card companies' addresses;

3. Keep credit cards within sight during credit transactions and retrieve them immediately;

4. Do not sign blank receipts, and draw a line through the blank space above the total amount charged;

5. Keep copies of all receipts for reconciliation with monthly billing statements;

6. Review credit card accounts every month and report questionable charges to the credit card issuer in writing;

7. Destroy all carbons and incorrect receipts; and

8. Never lend credit cards, leave credit cards or receipts lying around, or write credit card numbers on post cards or on the outside of envelopes.

When a credit card is lost or stolen, consumers should notify the card issuer immediately. Consumers are not liable for any transactions occurring after they have notified the card issuer. For unauthorized transactions occurring before the consumer notifies the card issuer, federal law limits consumer liability to $50.00[140]

If a client is unsuccessful in resolving a billing dispute with the merchant who honored a credit card, federal law provides an additional recourse. Any defenses a consumer has against a merchant honoring a credit card may be asserted against the card issuer if the purchase was for $50.00 or more, if the purchase took place in the same state as the consumer's address or within 100 miles, and if the card issuer is not the same as or controlled by the merchant.[141] Other actions a consumer may take include contacting state and local consumer protection offices and Better Business Bureaus. Additionally, attorneys should inform the FTC of fraudulent acts and practices so that the agency itself can seek enforcement of the laws, if necessary. Complaints may be addressed to the Correspondence Branch, FTC, 6th Street and Pennsylvania Avenue N.W., Washington, D.C. 20580. MAJ Pottorff.

Fraud, Theft, and the Automatic Teller Machine

The past ten years have seen the automatic teller machine (ATM) card achieve almost universal acceptance and use in the United States and on most military installations. These cards are typically issued in the shape of a credit or charge card and are accompanied by a personal identification number (PIN) unique to, and presumably known only by, the holder.

Unlike charge cards, when an ATM card is used, the account holder at that moment has funded the transaction, because the ATM withdraws money on hand in the holder's account. This arrangement raises the stakes for a card holder in the event the ATM card is stolen. Fortunately, the Electronic Fund Transfer Act (EFTA),[142] similar to the laws controlling credit cards, limits liability if the card holder notifies the ATM card issuer promptly. Liability is limited to a maximum of $50.00 if the holder notifies the issuer of the theft of a card within two business days of discovering the theft. Failure to notify the issuer within two days of discovering a theft will result in a maximum liability of $500.00. Even more critical, the consumer who never bothers to read an account statement may lose the entire account balance. If the consumer does not notify the card issuer of an error within sixty days of the time the card issuer sends the consumer a periodic statement reflecting any unauthorized transfer, the consumer's potential liability is the amount of the account balance.

Soldiers and other consumers are beginning to heed their card issuers' advice not to keep ATM cards and PINs together in wallets and purses. This greatly reduces the possibility of unauthorized withdrawals following loss or theft of the wallets and purses.

Unfortunately, thieves have become more sophisticated in their approach. A recent development in California involving thefts of ATM cards provides ample instructional material for legal assistance attorneys. Under the new scheme, if a thief finds only the ATM card and not a PIN in a wallet, he is not necessarily out of luck. After using the victim's identification to determine the victim's

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[139] *Report Bulletin No. 15*, Consumer and Commercial Credit 1, 3 (Jan. 8, 1990) (discussing Federal Trade Commission consumer warning).

[140] 15 U.S.C. § 1643 (1982 & Supp. V 1987).

[141] *Id.* § 1666i.

[142] *Id.* § 1693.

address and phone number, the thief calls the victim and represents himself as a security employee of the bank that issued the ATM card. The thief informs the relieved consumer that his or her wallet has been found and will be available for pickup the following day. In the meantime, the thief asks, "please give me your personal identification number so I can verify that this is really your ATM card that I have recovered." Not surprisingly, some consumers comply and are victimized once again.

These developments are ripe for inclusion in command information classes and articles designed to further the preventive law program at an installation. The military community can benefit from advance notice of problems associated with ATM use and timely guidance on how to limit liability. MAJ Pottorff.

Professional Responsibility Note

South Carolina Adopts New Ethics Rules

South Carolina continues the trend of states patterning new rules of ethics after the Model Rules of Professional Conduct. The new rules, which apply to all South Carolina lawyers, will take effect on September 1, 1990.[143]

The new South Carolina Rules differ from the Model Rules in several respects. The South Carolina version of Rule 1.5 specifically allows lawyers to charge contingent fees in domestic relations cases relating to collection of alimony and child support arrearages. Model Rule 1.5(d) expressly prohibits contingent fee arrangements in most domestic relations matters.[144]

A major difference will exist between the South Carolina and the Model Rules regarding confidentiality. South Carolina Rule 1.6 substantially broadens lawyer discretion in the area by allowing attorneys to reveal information necessary to prevent a client from committing any future criminal act. Model Rule 1.6, on the other hand, gives attorneys discretion to release information concerning a prospective crime only when the lawyer reasonably believes that the criminal act "is likely to result in imminent death or substantial bodily harm."[145]

The South Carolina Rule on confidentiality will also differ from the Army Rules. Attorneys subject to the Army Rules of Professional Conduct for Lawyers must release information necessary to prevent a client from committing a criminal act likely to result in imminent death or substantial bodily harm or that will significantly impair national security or the readiness or capability of a military unit, vessel, aircraft, or weapon system.[146] Despite the difference in the two versions, Army attorneys licensed in South Carolina will comply with both ethical standards by making disclosure in all cases falling within the mandatory purview of the Army Rules and refraining from making disclosures regarding all lesser prospective crimes.

The South Carolina Rules will also modify the Model Rule regarding imputed disqualification. Under Model Rule 1.8(i), neither a lawyer nor any members of his or her firm may represent a client if the lawyer's parent, child, sibling, or spouse represents the opposing party.[147] Under the South Carolina version of the rule, the lawyer will still be disqualified under these circumstances, but other members of the firm may represent the prospective client. The South Carolina rule in this regard is consistent with the Army approach, which generally rejects the concept of automatic imputed disqualification.[148]

The South Carolina Rule modifies the Model Rule on solicitation by including several additional requirements. Under the South Carolina Rule, lawyers soliciting clients in recordings or in writing must include a statement advising the recipients that they might wish to consult their own lawyers and must list the number of the state bar's lawyer referral service. The solicitation must also contain a statement that complaints regarding the solicitation may be made to the state disciplinary board. All solicitations must be filed with the state disciplinary board.

South Carolina brings the number of states that have adopted the Model Rules to thirty-two. In addition, North Carolina and California have recently adopted new ethics rules that are based, in part, on the provisions of the Model Rules. The following is a list of all the states that have adopted new ethics rules since the Model Rules were adopted by the ABA in 1983:[149]

Arizona: Model Rules as amended; February 1, 1985.

Arkansas: Model Rules as amended; January 1, 1986.

California: Takes structure and substance from both Model Rules and Model Code; May 27, 1989.

Connecticut: Model Rules as amended; October 1, 1986.

Delaware: Model Rules as amended; October 1, 1985.

Florida: Model Rules as amended; January 1, 1987.

Idaho: Model Rules as amended; November 1, 1986.

Indiana: Model Rules as amended; January 1, 1987.

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[143] 5 ABA/BNA Lawyer's Manual On Professional Conduct, No. 27 (Jan. 27, 1990).

[144] Model Rules of Professional Conduct [hereinafter Model Rules], Rule 1.5(d).

[145] Model Rule 1.6(b)(1).

[146] DA Pam. 27-26.

[147] Model Rule 1.8(i) and Model Rule 1.10.

[148] Army Rule 1.10. The Army generally permits representation in this circumstance so long as conflicts of interest can be avoided and there will be no compromise of independent judgment, zealous representation, and protection of client confidences.

[149] The information regarding these rules was taken from 5 ABA/BNA Lawyers' Manual On Professional Conduct, 01:3, 12-1989.

Kansas: Model Rules as amended; March 1, 1988.

Kentucky: Model Rules as amended; January 1, 1990.

Louisiana: Model Rules as amended; January 1, 1987.

Maryland: Model Rules as amended; January 1, 1987.

Michigan: Model Rules as amended; October 1, 1988.

Minnesota: Model Rules as amended; September 1, 1985.

Mississippi: Model Rules as amended; July 1, 1987.

Missouri: Model Rules as amended; January 1, 1986.

Montana: Model Rules as amended; July 1, 1985.

Nevada: Model Rules as amended; March 28, 1986.

New Hampshire: Model Rules as amended; February 1, 1986.

New Jersey: Model Rules as amended; September 10, 1985.

New Mexico: Model Rules as amended; January 1, 1987.

North Carolina: Takes structure and substance from both Model Rules and Model Code; October 7, 1985.

North Dakota: Model Rules as amended; January 1, 1988.

Oklahoma: Model Rules as amended; July 1 1988.

Oregon: Amended Model Code incorporating substance of some Model Rules; June 1, 1986.

Pennsylvania: Model Rules as amended; April 1, 1988.

South Carolina: Model Rules as amended; September 1,1990.

South Dakota: Model Rules as amended; July 1, 1988.

Texas: Model Rules as amended; January 1, 1990.

Utah: Model Rules as amended; January 1, 1988.

Virginia: Amended Model Code incorporating substance of some Model Rules; October 1, 1983.

Washington: Model Rules as amended; September 1, 1985.

West Virginia: Model Rules as amended; January 1, 1989.

Wisconsin: Model Rules as amended; January 1, 1988.

Wyoming: Model Rules as amended; January 12, 1987.

MAJ Ingold.

Estate Planning Note

Drafting Survivorship Provisions in Wills

The survivorship clause included in most wills serves an important, often overlooked, purpose. The requirement that a beneficiary survive the testator by a specified period of time avoids the need to complete two probate proceedings to pass property to heirs. It can also serve to avoid litigation when the exact order of death between a testator and beneficiary cannot be determined.

Almost every state has adopted the Uniform Simultaneous Death Act.[150] This Act provides that if there is not sufficient evidence of the exact order of death, the testator shall be deemed to have survived the beneficiary.

Joint tenancy and community property are treated differently under the Uniform Act. The Act provides that in the case of the simultaneous death of joint tenants, the property will pass as if each owned one-half.[151] Similarly, community property passes in common death situations as if the husband owned one-half and the wife owned one-half.[152]

The provisions of the Uniform Simultaneous Death Act apply only if the decedent's will does not indicate a contrary intent. One instance in which the presumption supplied by the Act should be modified is when the testator leaves property to a spouse to take full advantage of the spouse's unified federal estate tax credit. For example, assume that a husband's gross estate is valued at $1 million and his wife owns property of $200,000. To minimize federal estate taxes, an effective testamentary scheme would be for the husband's will to distribute $400,000 outright to the wife and place $600,000 in a trust that qualifies for the husband's federal estate tax credit. Under such a plan, the husband's will should specify that if the exact order of death cannot be established, his wife should be deemed to have survived him. Accordingly, both the husband and the wife would be able to use their federal estate tax credit fully. To ensure that a loop is not created, the wife's will should maintain the presumption.

Attorneys should distinguish simultaneous death provisions from "common disaster" clauses. These clauses divest a legacy if the beneficiary dies in a "common disaster" with the testator. For example, if a testator and the beneficiary were in a car accident and the beneficiary dies of accident-related causes thirty days after the testator, the legacy would not pass under a common disaster provision. Common disaster clauses frequently have been litigated in the courts and should be avoided if possible.

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[150] Unif. Simultaneous Death Act § 8a U.L.A. 561 (1989). The states that have not adopted some version of the Act are Louisiana, Montana, and Ohio.

[151] Unif. Simultaneous Death Act § 3, 8a U.L.A. 575 (1983).

[152] Unif. Simultaneous Death Act § 4, 8a U.L.A. 579 (1983).

Will drafters should be aware that the presumption supplied by the Simultaneous Death Act does not apply if the exact order of death can be established. Thus, the Act can not be relied upon to eliminate the waste associated with requiring two probate proceedings if a beneficiary outlives the testator by only several minutes or hours. Therefore, it is advisable in most circumstances to insert a survivorship condition in a will that requires beneficiaries to survive a specified period after the testator's death in order to take under a will.

Some states furnish a survivorship period by statute. For example, the Uniform Probate Code provides that a beneficiary must survive the testator by 120 hours.[153] Like the Simultaneous Death Act, however, this provision does not apply if the will specifies otherwise.

A recent case illustrates that will provisions must be carefully drafted to enjoy the benefit of statutory survivorship requirements. The testator's will in *Estate of Acord v. Commissioner*[154] provided that a gift to his wife should go to other beneficiaries if his wife died before or at the same time that he did, or if she died under circumstances that cast doubt on the exact order of death. The wife died thirty-eight hours after her husband, and the husband's estate argued that the will bequest to her was terminated by operation of Arizona's 120-hour survivorship requirement. The Tax Court ruled that because the decedent's will contained some language dealing explicitly with survivorship provisions, the statutory survivorship period did not apply. The court rejected the argument that the statute would not apply only when the will required some specific stated period of time other than 120 hours.

Drafters can easily avoid the type of problems encountered in *Acord* simply by inserting clear survivorship periods in the will. The period should preferably be stated in terms of hours and be limited to a reasonable period that will not unduly prolong probate proceedings. The survivorship period should be less than six months, because gifts conditioned on a longer period will not qualify for the federal estate tax marital deduction.[155] Drafters should carefully word all survivorship conditions to ensure that the six-month marital deduction limit is not unintentionally exceeded. Recently, the Tax Court denied a marital deduction to an estate because the will specified that an interest would not pass if the testator's spouse died before the will was admitted to probate.[156] The court noted that the qualification of an estate to the marital deduction must be determined as of the time of death. Under Texas law, the court observed, a will could be admitted to probate at anytime up to four years after death. Accordingly, the survivorship condition exceeded the six months permitted under the code, and the gift passing to the spouse did not qualify for the marital deduction.

Attorneys should not overlook the potential significance of boilerplate administrative clauses such as the survivorship clause. These clauses should in every case be carefully drafted to meet the testator's testamentary goals. MAJ Ingold.

Real Property Note

VA Loan Compromise Programs

Soldiers having difficulty maintaining mortgage payments or selling homes purchased with Department of Veteran's Affairs (VA) guaranteed loans should consider entering into a compromise agreement with the VA.[157] The new loan compromise program provides soldiers with an opportunity to substantially reduce or eliminate financial losses associated with loan terminations.[158]

The theory behind the new program is that all parties involved in a VA guaranteed loan will benefit when a soldier or veteran avoids loan foreclosure by selling the property. To encourage soldiers to sell their property, the VA will help the soldier by refinancing the amount of the loan balance remaining after the sale of the home.

The compromise agreement should be considered when, as a result of a decline in real estate values, a soldier is unable to sell a home for a price sufficient to cover the amount of a loan balance. The program may also be used when delinquent interest increases the loan balance above the fair market value of the property.

To participate in the program, the soldier must find a buyer willing to purchase the property for its fair market value. The selling price must also be less than the outstanding balance on the original loan. A copy of the sales contract, a recent property appraisal, and other documents should be submitted to the VA along with a request to enter into a compromise agreement.[159] If the VA approves the request, it will pay all or part of the remaining balance and finance all or part of the balance. The soldier must agree to remain liable for the amount of the claim the VA is required to pay the lender. The new debt can be financed for up to thirty years at an interest rate as low as four percent. Once this debt is paid off, the soldier's VA loan eligibility will be restored.

Soldiers who have allowed others to assume their loans may also take advantage of the compromise program to avoid loss upon loan termination. The soldier should work out an agreement with the buyer to retake possession of the home, make all overdue payments, and then attempt to sell the home. After receiving an offer to purchase the home for fair market value, the soldier should then request the VA to approve a compromise agreement.

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[153] Unif. Probate Code § 8 U.L.A. (1983).

[154] 93 T.C. 1 (1989).

[155] I.R.C. § 2056(b)(3) (West Supp. 1989).

[156] Shephard v. Commissioner, 58 T.C.M. (CCH) 671 (1989).

[157] The Compromise Agreement Program is described in VA Loan Guaranty Letter No. 87-49, November 17, 1987.

[158] Information concerning this program was forwarded by CPT Preston L. Mitchell, Chief of Legal Assistance, Fort Sam Houston, Texas.

[159] The following information should be submitted to the local VA regional office having jurisdiction over the loan: a copy of the sales contract, a statement of loan account as of the estimated closing date, estimates of all costs expected to be incurred with the transaction, a property appraisal, a release of liability package if the loan is to be assumed, and a Veteran's Statement and Agreement of Liability to the VA.

Another new VA compromise program is available for soldiers who are liable for a deficiency after loan foreclosure. Soldiers should, however, make every possible effort to avoid foreclosure. Foreclosure sales generally result in a below fair market value sale and therefore raise the amount of the deficiency the soldier must pay. If foreclosure proceedings cannot be avoided, a compromise agreement may be worked out with the VA to finance the deficiency at a favorable interest rate.

Soldiers facing financial problems with homes purchased with VA guaranteed loans should immediately contact the VA regional office having jurisdiction over the loan. The VA should provide counseling to the soldier on how to proceed to reduce or eliminate losses. MAJ Ingold.

Administrative and Civil Law Note

Contracting-Out Decisions: "Grievable or Not?"

A highly publicized controversy between the National Federation of Federal Employees and the Internal Revenue Service reached the Supreme Court for oral argument on January 8, 1990.[160] The controversy concerned the union's ability to negotiate or grieve management's decision to contract-out federal work. The issue before the Supreme Court was whether the union's proposal violated the management rights provision in 5 U.S.C. § 7106(a)(2)(B)(1982). The contested proposal would establish the grievance and arbitration provision of the union's master labor agreement as the union's internal administrative appeal procedure for disputed contracting-out cases. The Internal Revenue Service alleged that the union's proposal violated the management rights provisions in 5 U.S.C. § 7106(a)(2)(B) and was, therefore, nonnegotiable.

During oral arguments, the Federal Labor Relations Authority maintained that the union's proposal was negotiable because it would not impair management's statutory reserve right to contract-out. In addition, the Authority asserted that a violation of OMB Circular A-76 would be grievable, even without the union's proposal. The Authority based its argument on the definition of grievance found in section 7103(a)(9)(C)(ii) of the Civil Service Reform Act of 1978. That section defines grievance, inter alia, as "any claimed violation, misinterpretation, or misapplication of any *law*, rule, or regulation affecting working conditions" (emphasis added). The Authority contended that OMB Circular A-76 was law and that if it was violated, the union had a right to grieve pursuant to section 7103(a)(9)(C)(ii).

The government asserted that the introductory words to the management rights clause nullified the application of section 7103(a)(9)(C)(ii). The management rights clause (section 7106(a)(2)(B)) provides, in part, as follows, "Subject to subsection (b) of this section, *nothing in this chapter shall* affect the authority of any management official of any agency ... to make determinations with respect to contracting out" (emphasis added). The government's argument was that the words "nothing in this chapter" included the definition of grievance and, therefore, made section 7103(a)(9)(C)(ii) inoperable in regard to management's right to contract-out.

The government also argued that OMB Circular A-76 was not law. The government stated that OMB Circular A-76 was *policy* and was, therefore, not affected by section 7106(a)(2)(B) or 7103(a)(9)(C)(ii). Justices Scalia, White, and O'Connor appeared to focus their attention on this aspect of the government's argument. In particular, Justice White asked, "Can OMB Circular A-76 be modified or could the Executive Branch exempt an agency from its coverage?" Deputy Solicitor General Sharpiro answered both of these questions in the affirmative.

The government eagerly awaits the Supreme Court's decision. MAJ McMillion.

Academic Department Note

Command and General Staff College's Constructive Credit Policy for Graduates of The Judge Advocate General's School Graduate Course

The Command and General Staff College (CGSC) recently completed an in-depth analysis of portions of the resident Graduate Course at The Judge Advocate General's School (TJAGSA) and CGSC's Nonresident Program. As a result of this study, a revised policy has been established for the awarding of constructive credit to graduates of TJAGSA's resident Graduate Course for specific portions of the CGSC Nonresident Program.

CGSC will continue to grant constructive credit for staff communications and military law. TJAGSA's Graduate Course program meets or exceeds the objectives outlined in the CGSC Program of Instruction for both courses. This credit includes the writing requirement and the oral briefing associated with staff communications.

Although the study recognized the excellent leadership curriculum offered by TJAGSA, the analysis noted substantive dissimilarities between that program and the CGSC leadership program. Accordingly, a decision was made to not grant constructive credit for the leadership portion of CGSC.

The revised policy will apply to all JA CGSC enrollments after 4 February 1990. Constructive credit for communications and military law must be applied for within three years of graduation from the resident TJAGSA Graduate Course and may be used only in conjunction with the correspondence option of CGSC.

[160] Department of Treasury, IRS v. Federal Labor Relations Authority (U.S. Supreme Court No. 88-2123).

Claims Report

United States Army Claims Service

Claims Notes

The Purpose of Claims Policy Notes

For many years, the Army Claims Service has used "unofficial" publications, such as the USARCS Bulletins and, more recently, the USARCS Claims Manual, to disseminate claims guidance—in addition to that found in AR 27-20—to the field. With the publication of the new DA Pamphlet 27-162, for which USARCS has assumed proponency, the USARCS Claims Manual is, in effect, superseded. But the DA Pamphlet is not susceptible to change on a piecemeal or quarterly basis; revisions will be several years apart. With the publication of "The Claims Report" in *The Army Lawyer*, we have a means of providing additional guidance and clarification to field offices—"Claims Policy Notes." Pursuant to paragraph 1-9*f*, AR 27-20 (Change 2), such notes are binding on Army claims personnel.

Whenever a Claims Policy Note is published (such as the one following this note), it will reference both AR 27-20 and DA Pamphlet 27-162. Some mark, such as an asterisk, should be placed at the cited paragraphs in those publications to indicate that additional policy guidance has been provided. Photocopies of the Claims Policy Note should be made and placed in a notebook (or at the back of the notebook containing the AR and pamphlet) for future reference. Depending on the number and frequency of these notes, USARCS will consider publishing a compilation of all notes previously published from time to time to replace the photocopies maintained by offices. Of course, when the pamphlet is revised, all of the notes will be incorporated in the text and the separate references can be disposed of at that time. COL Lane.

Household Goods Claim Accrual Date

This is a Claims Policy Note providing additional guidance to that found in paragraph 11-6, AR 27-20, and paragraph 2-14, DA Pamphlet 27-162. IAW paragraph 1-9f, AR 27-20, this guidance is binding on all Army claims personnel.

The Personnel Claims Act (PCA) provides that a claim under that statute must be presented "within two years after the claim accrues" (31 U.S.C. § 3721(g)). AR 27-20 provides the general accrual rule, i.e., that "a claim accrues at the time of the incident causing the loss or damage, or at such time as the loss or damage is or should have been discovered by the claimant through the exercise of due diligence" (para 11-6*a*). The regulation also provides several special accrual rules for property in government storage. A recent accrual issue not addressed in AR 27-20 (but addressed in Personnel Claims Bulletin No. 61 and incorporated into para 2-14*d*, DA Pam 27-162) is that of multiple deliveries of a single shipment. This issue will be discussed and clarified later in this note.

As there is no judicial review under the PCA, there are no court decisions discussing the PCA statute of limitations and the date a claim accrues. Nevertheless, court decisions concerning the interpretation of tort claims statutes of limitation can provide some basic concepts for application in developing and understanding PCA accrual rules.

The Supreme Court has stated that where a waiver of sovereign immunity statute contains a statute of limitations, courts must not construe the time-bar in a manner beyond that which Congress intended. When Congress attaches conditions to its waiver of sovereign immunity, these conditions must be strictly observed, and exceptions thereto are not to be lightly implied. *Block v. North Dakota*, 461 U.S. 273 (1983). Thus, the first principle to observe is that a statute of limitations must be strictly interpreted. The courts have also said that one who knows of an injurious act may not delay the filing of suit until the time, however long, when he or she learns the precise extent of the damage resulting from the tort. When the nature of the injury is not immediately manifest, the determination of when the cause of action accrues does not depend on when the injury was inflicted, but on when the person has reason to know he has been injured. *Portis v. United States*, 483 F.2d 670 (4th Cir. 1973); *see also Ashley v. United States*, 413 F.2d 490 (9th Cir. 1969). Put another way, the statute of limitations begins to run when the first injury, however slight, occurs, even though the injury may later become greater or different. *Free v. Granger*, 887 F.2d 1552 (11th Cir. 1989). The important concept to glean from these cases is that the statute of limitations applies to the cause of action, in our case, the claim; it does not apply to the items damaged, i.e., to the extent of damage. Thus, when household goods are delivered on 1 June and some damage is noted, the claim accrues at that time, even if further damage is found on 5 June when a previously unopened box is finally opened and the contents inspected.

Another basic concept that must be set forth is that only one claim arises out of a single shipment. But it must be remembered that there may be more than one shipment involved in a permanent change of station. A soldier returning to CONUS from Europe may have a hold baggage shipment, a household goods shipment, and a shipment of property that was in nontemporary storage. Each shipment containing loss or damage will give rise to a

separate claim, with its own individual accrual date. This is important from a recovery standpoint, as only one claim can be filed with the moving company on a given shipment.

Finally, it is important to carefully distinguish the terms "shipment" and "delivery"; a single shipment may have multiple deliveries. For example, household goods arrive and go into temporary storage because quarters are not available. The soldier takes up temporary residence in a rented apartment and asks for a portion of his goods at that time. Once quarters are assigned, he requests the remainder of his goods. Thus, he has had two deliveries, but it is still only one shipment.

With this background, the rules in paragraph 11-6, AR 27-20, and paragraph 2-14, DA Pamphlet 27-162, are easier to understand.

1. *Single delivery of shipment.* Where there is damage to property in a shipment, the claim accrues on the date of delivery, which is the date the damage is known or should be known (as the carrier can be required to unpack all boxes). This rule has two variations.

a. Where the *only* damage turns out to be internal (and thus not known until the article is put into use) or to items not normally examined at delivery (such as Christmas ornaments delivered in July and not inspected until December), the claim accrues when the first such damage is discovered or should have been discovered (the first Christmas after delivery) rather than the date of delivery. The words "first such damage" is important as any damage to a shipment discovered by the claimant starts the statute running, even if that is not all of the damage; accrual relates to the existence of a claim, not to the extent of the claim.

b. Where there is *no* damage, but there is loss (i.e., missing boxes), the normal procedure is to initiate tracer action on the missing items. If they are not recovered within thirty days, they are presumed lost and the claim accrues at that time, that being when the loss is known or should be known.

2. *Property in storage.* For property in government-paid storage, a claim for damage during such storage (if it can be shown to have occurred during that time) accrues on the date that entitlement to such storage expires and the soldier is responsible for paying for continued storage. However, a new accrual date arises if at a later time the property is moved from storage at government expense; this accrual date is determined by applying the "delivery" rules. If property in storage is totally destroyed, such as in a warehouse fire, the accrual date is the date of notice of such loss, as the soldier then knows that he has lost all stored items. There is one variation to this latter rule, based on military necessity. If only *part* of the goods in storage are destroyed, notice of such does not start the statute of limitations. Instead, the accrual date would be the earlier of either the date the soldier goes to the storage site to inspect the damage or the date the goods are delivered to the soldier. This rule is necessary because soldiers store property normally when they are going overseas and ascertaining the damage and making a claim for partial loss in storage is not practical; the Army sent them away and will not pay for travel to inspect the loss.

3. *Multiple deliveries.* As stated above, a soldier in temporary quarters may have a part of a shipment that is in local nontemporary storage delivered to him. It is even conceivable that there would be several partial deliveries before the bulk of the shipment is finally delivered. Remembering that the statute of limitations relates to the cause of action, i.e., the claim and not specific property, and that there can be only one claim per shipment, the following rules and guidance applies.

a. If there is damage in any partial delivery, the soldier knows that he has a claim, even though he does not know the full extent of that claim (i.e., what damage exists in the undelivered property). The claim accrues as of the date of the partial delivery with damage.

b. If there is *no* damage in the partial delivery, but a requested item is not delivered, the statute does *not* begin to run on the date of the partial delivery. At that time the "loss" is only speculative, as the missing item could be still in storage and simply was not delivered because it was not readily located. In such situations, no claim accrues until the entire shipment is delivered; then the rules in 1, above, apply.

c. If there is no damage or loss in the partial deliveries, but damage or loss in the final delivery, the rules in 1, above, apply, with the earliest date for accrual of the claim being the date of the final delivery.

The multiple deliveries rule set forth in 3.a, above, has generated concern in several recent claims. Claimants have delayed filing their claims for all damage to a shipment until almost two years after the last delivery, which is after the running of the statute because of damage in an earlier delivery. Some claims offices have felt that claimants should not be penalized for not understanding this particular rule and should, at least, be allowed to recover for damage discovered within the two years preceding the claim, i.e., treat each delivery like a separate shipment. Because of these concerns, the following guidance is provided to assist claims offices in advising potential claimants and then in processing this peculiar type of claim.

First, claims information packets for potential claimants (usually handed out when they submit a DD Form 1840R)

do not warn the claimant of the issue. Such packets should contain the following or similar wording:

> WARNING: If your household goods are in local storage and you have received only a part of these goods, and there is damage to any of the items received in this partial delivery, your two-year period for filing a claim began on the date of delivery. File a claim as soon as possible for this damage and inform the claims office that this claim relates to a partial delivery of a shipment in which there may be other, undiscovered damage. The claims office will advise you on how to handle claiming for later discovered damage when the remainder of your goods are delivered.

Second, there are two strategies a claims office can employ for handling these claims. Let's assume a partial delivery with damage (remember, if there is "loss" only, no claim has accrued). One approach is to have the claimant file his claim as soon as possible (thus tolling the statute of limitations) and, if the claimant needs funds right away, adjudicate the damage in the partial shipment and make an emergency partial payment. The claim remains open until the entire shipment has been received, at which time the claimant then amends his claim to add newly discovered damage and final adjudication is accomplished. A "disadvantage" some will see to this approach is that leaving the claim open "spoils" their processing times, although USARCS does not see this as a problem and an SJA should not be upset with such as long as there is a valid reason for the long time. The other approach is to have the claimant file his claim as soon as possible (thus tolling the statute of limitations), adjudicate the damage in the partial shipment, make a final payment, and close the claim. Then, when the rest of the shipment is delivered, the claimant can request reconsideration, amend his claim to add the newly discovered damage, and receive a supplemental payment. If the request is more than a year after the initial payment, reconsideration can be allowed on the basis of "newly discovered evidence" (see para 11-19*c*, AR 27-20). COL Lane.

Tort Claims Note

Claims Against Nonappropriated Fund Activities

Tort claims against nonappropriated fund instrumentalities (NAFIs) are investigated and settled by Army claims offices, and then forwarded to the appropriate authority for payment from nonappropriated funds. Claims offices are responsible for notifying the appropriate NAFI that a claim has been filed (AR 27-20, para 12-3*c*).

When a tort claim against a NAFI is received by an Army claims office, a copy of the claim (usually the SF95) will be forwarded *immediately* to the NAFI as follows:

1. Claims against a NAFI *other than the Army & Air Force Exchange Service (AAFES)* that are filed in an amount exceeding $15,000: Send a copy to Commander, Community and Family Support Center, ATTN: CFSC-RMB-I, Alexandria, VA 22331-0508.

2. *Any* claim against an AAFES activity: Send a copy to Office of the General Counsel, Headquarters AAFES, P.O. Box 660202, Dallas, TX 75266-0202. COL Lane.

Personnel Claims Note

Sales Tax Not Payable if Actual Replacement Cost is Less Than Estimate

On reconsideration, a claimant recently requested reimbursement of sales tax. Paragraph 11-14, AR 27-20, provides that sales tax is payable if a claimant actually replaces or repairs an item and is obligated to pay the expense. It is not payable if the claimant has merely presented a replacement or repair estimate with the claim.

The claimant had experienced the loss of recently purchased stereo items from his household goods shipment. He substantiated ownership of the lost equipment and presented a valid estimate in the amount of $2,231 for a turntable, amplifier, equalizer, and speakers of the same quality as the missing items. The claims office considered the estimate accurate and appropriate for the time and place of loss and approved the claim.

Following approval of the claim, the claimant purchased a different brand of stereo equipment from a different vendor for $1,159, which included $93 in tax. He demanded reimbursement of the tax, quoting the provisions of paragraph 11-14. USARCS denied further payment, noting that although the claimant had actually incurred the sales tax, the total cost of replacing the items was far less than he had been reimbursed. Whether due to a "sale" price or purchase of items of lesser quality, the claimant had incurred no out-of-pocket expenses in replacing the items due to the sales tax. As a gratuitous payment statute, 31 U.S.C. § 3721 should not be used to provide a windfall to a claimant. Mr. Ganton.

Management Note

Certificates of Achievement

All staff judge advocates are reminded that U.S. Army Claims Service (USARCS) Certificates of Achievement may be awarded to selected personnel serving in judge advocate claims offices worldwide. The certificate provides special recognition to civilian and enlisted personnel who have made significant contributions to the success of the Army Claims Program within their respective commands.

To be awarded the certificate, an employee must:

1. be an enlisted or civilian employee currently serving in a judge advocate claims office;

2. have worked in claims for a minimum of five years (this period may be figured on a cumulative basis and include different assignments or claims positions);

3. be nominated by the staff or command judge advocate, detailing the contributions of the employee that makes him or her worthy of this recognition; and

4. be the only person in an office nominated for a certificate in any calendar year (may be waived in exceptional cases at the request of the nominating official).

Nominations should be addressed to the Commander, USARCS, the approving official for the award of the Certificate of Achievement. Upon approval, the signed certificate will be mailed to the nominating official for presentation at an appropriate ceremony.

The names of the recipients are published in the USARCS report, which is distributed each year at the JAG CLE. Twenty-two claims personnel have been awarded the U.S. Army Claims Service Certificate of Achievement. Mr. Mounts.

Labor and Employment Law Notes

OTJAG Labor and Employment Law Office,
FORSCOM Staff Judge Advocate's Office,
and TJAGSA Administrative and Civil Law Division

Equal Employment Opportunity Law

Security Clearance

In *Thierjung v. Durkin, Director, Defense Mapping Agency*, 90 FEOR 3096, the EEOC recognized that pursuant to *Department of the Navy v. Egan*, 108 S. Ct. 818 (1988), it had no authority to second-guess the merits of a security clearance revocation decision. The EEOC did hold, however, that it had the authority to determine whether the requirement that an individual have a security clearance in order to occupy a particular position was applied in a discriminatory manner.

The employee's clearance was revoked after he advised the agency that he had undergone treatment for alcoholism. The employee alleged handicap discrimination. The EEOC held that Thierjung was not discriminated against and that the requirement for a security clearance was applied consistently both for employees in complainant's protected group and for those outside his group.

Thierjung seems to be the next logical step in the EEOC's attempt to minimize the impact of *Egan*. In *Hahn v. Marsh*, 89 FEOR 1109, the EEOC found that a complainant stated a justiciable allegation of national origin discrimination when the agency non-selected a North Korean individual because it would take almost a year to process a security clearance.

In *Guillot v. Garrett*, 28 GERR 187 (Feb. 12, 1990), the EEOC applied the *Thierjung* security clearance analysis to an employee who sought rehabilitation for a drug problem. The EEOC determined that the requirement for the employee to possess a security clearance was applied non-discriminatorily. The EEOC also examined the agency's responsibility to attempt to reassign the employee under both *Egan* and the Rehabilitation Act of 1973. They found that reassignment was not possible because all positions at the employee's location required security clearances. The agency had no responsibility to conduct a worldwide search for a position for the employee.

Civil Rights "Act" of 1990

Two bills are being considered in Congress (H.R.4000 and S.2104) to amend Title VII of the Civil Rights Act of 1964. The identical bills, introduced by Senator Kennedy and Representative Hawkins, were designed to respond to five Supreme Court rulings that the drafters believe "cut back dramatically on the scope and effectiveness of civil rights protections": *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989); *Martin v. Wilks*, 109 S. Ct. 2180 (1989); *Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989); *Lorance v. AT&T*, 109 S. Ct. 2261 (1989); *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989). The bills would expand recoverable attorneys' fees to include "expert fees and other litigation expenses" and would extend the statute of limitations in actions against the Federal Government from thirty to ninety days. In addition, the bills have a grandfathering provision that will make the act retroactive to May 1, 1989, and toll the statute of limitations in some cases. Labor counselors need to be aware that instances of alleged discrimination that took place last summer may be timely if this bill is enacted.

Retaliation

Two recent EEOCCRA decisions highlight Title VII protection from retaliation for witnesses. In one instance a

newly assigned supervisor was a witness at a USACARA fact-finding conference in which his supervisor was the Responding Management Official (RMO). The testimony was not damaging, but it was not what the RMO hoped to hear. The same night the witness testified, the RMO said, in front of the witness and others, that those of the witness's national origin could not be trusted; seventeen days later the witness was terminated. The witness filed a complaint based on national origin and retaliation. The latter ground was sustained.

The second case involved alleged perjury by an EEO counselor at an EEOC hearing. The labor counselor referred the matter to CID, which "titled" the EEO counselor after its investigation. The EEO counselor prevailed in her claim of retaliation because of CID's "inadequate investigation" and lack of factual basis supporting an allegation of perjury, because a management witness had been accused of perjury in a court case but not investigated, and because of the chilling effect the actions had on the EEO counselor's testimony in an upcoming court case. Corrective action included, in part, purging CID records. Do not construe this decision as providing a blank check for perjury by EEO witnesses, but before you act on a perjury allegation, contact your MACOM labor counselor or the Labor and Employment Law Office.

Sexual Favoritism

On January 12, 1990, the EEOC issued policy guidance on sexual favoritism. *See* 32 DLR D-1 (Feb. 15, 1990). The guidance addresses paramour favoritism, implicit "quid pro quo" harassment, and hostile environment harassment.

An isolated instance of favoritism by a supervisor toward a paramour does not give rise to a Title VII complaint. In such a *consensual* relationship, a coworker, whether male or female, will not be able to show that he or she would have been treated more favorably if he or she were of a different sex. In other words, Title VII prohibits discrimination on the basis of gender, not sexual affiliation.

Supervisors who engage in *coerced* sexual conduct or *widespread* sexual favoritism may communicate that such conduct is a prerequisite to job benefits. This scenario can form the basis of an implied "quid pro quo" harassment claim for employees of the same sex as the one coerced. In addition, the EEOC's guidance states that this same factual situation can demonstrate a hostile work environment that might be offensive to either sex and, as such, would be actionable under Title VII.

Civilian Personnel Law

Probationary Employee MSPB Appeals

On January 24, 1990, OPM expanded its terminology for allegations of handicap discrimination by probationary employees for MSPB appeals of terminations (55 Fed. Reg. 2383). The previous language in 5 C.F.R. § 315.806 incorporated only "physical handicap." Consistent with the Rehabilitation Act of 1973, the terminology was changed to "handicapping condition." The revision does not change the jurisdictional prerequisite that handicap discrimination can be raised only if it is in addition to an allegation of either of the following: 1) discrimination based on partisan political reasons or marital status; or 2) improper procedure.

Drug Testing

On January 22, 1990, the Supreme Court rejected an attempt by NFFE to obtain review of the D.C. Court of Appeals' decision that upheld random testing of civilian drug and alcohol counselors. The Supreme Court's denial of certiorari preserves the Army's right to conduct urinalysis testing of employees who provide drug and alcohol abuse counseling and treatment to soldiers and civilian employees identified as users of illegal drugs. *National Federation of Federal Employees v. Cheney*, 883 F.2d 1038 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 864 (1990).

On the same date, the Court denied review of the D.C. Circuit's opinion sustaining that part of the Department of Justice's program of random drug testing of employees holding top secret security clearances. *Harmon v. Thornburgh*, 878 F.2d 484 (D.C. Cir. 1989), *cert. denied*, 110 S. Ct. 865 (1990).

The Office of Personnel Management recently issued FPM Letter 792-19, Establishing a Drug-Free Federal Workplace, dated 27 December 1989. The letter incorporates provisions of Executive Order 12564 and consolidates and revises previous FPM letters on the subject. The letter covers agency drug testing programs and procedures. It lists actions that can be taken by an agency upon determination that an employee used illegal drugs. The actions include removal, referral to an Employee Assistance Program, and discretionary discipline. OPM did not revise and clarify their procedural guidance with regard to the agency obligation to accommodate employees identified as drug addicts and alcoholics. OPM, however, is in the process of developing new guidance on the issue of reasonable accommodation.

In *Aberdeen Proving Ground v. FLRA*, 890 F.2d 467 (D.C. Cir. 1989), the court addressed the negotiability of proposals concerning: 1) independent testing of new and split urine samples; 2) safeguards for ensuring the qualifications of testing personnel; and 3) evidentiary presumptions concerning the validity of an employee's documentation of legitimate drug use.

While the Authority had held that all three proposals were potentially negotiable, the court reasoned that the first two were nonnegotiable under the Federal Service Labor-Management Relations Act because they conflicted

with the drug testing guidelines issued by the Secretary of Health and Human Services. The third proposal was found to be consistent with the Secretary's guidance and therefore negotiable under 5 U.S.C. § 7101 *et seq.*

USACPEA Adverse Actions Study

The U.S. Army Civilian Personnel Evaluation Agency (USACPEA) recently completed a review of disciplinary and adverse actions. It is being distributed to field CPOs. As part of this review, supervisors were queried as to their opinions concerning the utility of both MER and the labor counselor. Overall, the labor counselor was considered to be as helpful as the MER specialist; however, both only scored in the fifty percent to sixty percent approval range. A good percentage of supervisors view MER and the labor counselor as stumbling blocks. This belief was manifested in the anecdotal perception reported by some that their labor counselors take an inordinate amount of time to review proposal and decision letters. The study states that the time taken varies from one to ten days for each review. One study recommendation was to amend AR 690-700 to eliminate the labor counselor coordination in minor disciplinary actions.

The study also recommends that in instances where the CPO and labor counselor disagree on what punishment should be imposed, the CPO's opinion should control. Obviously, the study has missed a significant point in this regard—both the CPO and labor counselor are staff officers who only make *recommendations* to the supervisor concerned.

The study advocates the civilianization of all labor counselor slots to promote continuity and experience. The study fails to take into account the Army's requirement to have some of its military attorneys trained in labor law and related fields. The Labor and Employment Law Office will oppose these recommendations.

The study does make many valid observations. For instance, it notes a somewhat logical inconsistency in the way the Army handles AWOL cases. When an employee takes an unauthorized day off, we normally we give them another (suspension). Thus, in the long run, the manager is left with less help to achieve his mission. The study recommends an expedited letter of reprimand for such infractions, with removal for repeated AWOLs.

Labor counselors must strive to achieve fast turn-around time for actions and to build a strong rapport with the CPO and EEO Offices, and with managers, when appropriate. This support can take the form of offering standards of conduct training or other avenues separate and apart from the usual legal review of adverse actions. We recommend that you review your CPO's copy of USACPEA's report. Future DCSPER Employee Relations Bulletins will address other issues in the report.

Labor Law

Judicial Review

Pub. L. No. 100-236, provides a procedure for the selection of a single federal court of appeals when appeals of an FLRA decision are filed in more than one circuit. Previously, the court in which the first appeal was filed was the court of venue. This practice resulted in a "race to the courthouse," where parties tried to be the first to file appeals in circuits that they felt would be more sympathetic to their position. Under the new law, a circuit court of appeals will be selected randomly from among those in which appeals were filed. The FLRA has revised 5 C.F.R., Part 2429, to incorporate this new legislation. 55 Fed.Reg. 2509 (25 Jan. 90).

New Labor Relations Regulation

AR 690-700, chapter 711, has been republished with an effective date of 14 February 1990. The new regulation simplifies the arbitration exception process, clarifies the role of labor counselors, and eliminates information that can be found in chapter 711 of the DOD Civilian Personnel Manual (DOD 1400.25-M) and in the Code of Federal Regulations.

Labor Relations Classics

ODCSPER at HQDA published the first installment of its hornbook treatment of federal labor relations law on 2 February 1990. Obtain this from your CPO. It is an excellent complement to TJAGSA's products.

Maintenance of Status Quo During Impasse

In *Order Denying Request for General Ruling*, 31 FLRA 1294 (1988), the Authority recapitulated its guidance from earlier cases as to when the status quo has to be maintained during the negotiation process. The Court of Appeals for the D.C. Circuit has recently had the opportunity to expound upon one aspect of this area—maintenance of status quo during impasse. In *NAGE v. FLRA*, 893 F.2d 380 (D.C. Cir. 1990), the union wrote two vague letters to the FMCS and the FSIP. The union failed to inform the FMCS of the details of the dispute, the fact that impasse had been declared, or the eighteen-day deadline for implementation decreed by management. The union only requested FMCS help "as soon as possible." In the submission to the FSIP, the union failed to use the FSIP form and, though it explained the impasse, it did not specifically request FSIP services. The court ruled that these facts did not trigger an agency duty to maintain the status quo.

Three-Party Arbitration

In *USPS v. APWU and Mail Handlers*, 893 F.2d 1117 (9th Cir. 1990), the court fashioned a "consolidation of

two individual consensual arbitrations." In this case, the postal service was involved in a dispute in which two unions both invoked arbitration under different contracts. The Ninth Circuit ruled that a district court can compel arbitration pursuant only to the respective collective bargaining agreements. The court held that "a contractual nexus is required as to both (a) the parties and (b) the subject matter" and that these requirements were met in the present case.

Arbitration by Supervisors

The Court of Appeals has held that an IRS tax auditor's status as a bargaining unit employee at time of removal, as opposed to the time of underlying misconduct, determines arbitrability. In *Hess v. IRS*, 892 F.2d 1019 (Fed. Cir. 1989), a probationary supervisor was demoted and then subsequently removed for conduct that occurred while he was a supervisor, but unrelated to the demotion. The court noted that an employee becomes "aggrieved" when an adverse action is taken, not when the misconduct occurs. In this instance, the employee was removed from a bargaining unit position, not a supervisory one.

NEES Adverse Action Appeals

An interesting trilogy of cases in the courts of appeals has assaulted the FLRA's contention that proposals permitting binding arbitration of adverse employment action with respect to nonpreference eligible excepted service employees are negotiable. *HHS v. FLRA*, 858 F.2d 1278 (7th Cir. 1988); *Treasury v. FLRA*, 873 F.2d 1467 (D.C. Cir. 1989); *HHS v. FLRA* ____ F.2d ____ (9th Cir. 1990). According to the courts, Congress has determined that such employees, attorneys in all three cases, should not have the right to contest adverse employment actions before a third party, as evidenced by the denial of MSPB rights for excepted service employees in the Civil Service Reform Act. The courts continue to hold that the rights and remedies provided under the Civil Service Reform Act—the agency grievance procedure—are a statutory maximum and therefore not conditions of employment subject to collective bargaining.

Criminal Law Division Notes

Criminal Law Division, OTJAG

Supreme Court — 1989 Term

Colonel Francis A. Gilligan
Lieutenant Colonel Stephen D. Smith

This is the first in a series of notes summarizing recent criminal law decisions of the United States Supreme Court and highlighting the application of Supreme Court decisions to military practice. As military practice has increasingly paralleled federal practice, it becomes critical that military counsel understand and apply Supreme Court precedent in the military courtroom. In this initial note, two cases deal with issues of evidence (impeachment and other acts of misconduct) that bear a direct relation to the Military Rules of Evidence. The remaining case addresses racially motivated peremptory challenges under the sixth and fourteenth amendments. Future notes will address Supreme Court criminal law decisions and their importance to military counsel as those cases are handed down.

In *James v. Illinois*[1] Justice White, who wrote the opinion limiting the exclusionary rule in *United States v Leon*,[2] was the pivotal vote in a 5-4 decision that held that a defendant's voluntary statement, which was the fruit of an illegal arrest that was not made in bad faith, may not be used by the prosecution to impeach the testimony of defense witnesses. The Court did not disturb its prior decisions that the exclusionary rule would not prohibit the prosecution from introducing illegally obtained evidence to impeach the defendant's testimony,[3] nor did the Court indicate that illegally obtained evidence may not be used to impeach a co-accused.

Justice Stevens, concurring, remarked that the "proper question"[4] for the Court to decide is "whether the admis-

[1] 46 Crim. L. Rptr. (BNA) 2051 (U.S. Jan. 10, 1990).

[2] 468 U.S. 897 (1984). For discussion of good faith exception and its limitations *see* E. Imwinkelried, P. Giannelli, F. Gilligan & F. Lederer, Courtroom Criminal Evidence, §§ 2213-14 (1987 and Supp. 1989).

[3] United States v. Havens, 446 U.S. 620 (1980)(evidence illegally obtained from co-conspirator could be used to impeach the accused); Harris v. New York, 401 U.S. 222 (1971)(voluntary and reliable incriminating statements obtained in violation of *Miranda* could be used to impeach the defendant); Oregon v. Hass, 420 U.S. 714 (1975); Walder v. United States, 347 U.S. 62 (1954)(evidence obtained from illegal search could be used to impeach the defendant's testimony). *See also* Mil. R. Evid. 304(b); 311(b)(1).

[4] 46 Crim. L. Rptr. at 2054.

sion of the illegally obtained evidence ... would sufficiently advance the truth-seeking function to overcome the loss to the deterrent value of the exclusionary rule."[5] Justice Brennan, writing for the majority,[6] recognized that the threat of criminally prosecuting the defendant for perjury is not a significant deterrent to a defendant facing a long prison term. Justice Stevens indicated that the impact on the truth seeking function of the trial is overestimated by the dissent because a witness who is not on trial faces a "far different calculus than one whose testimony can mean the difference between acquittal and a prison sentence."[7] Such a witness, when faced with the hard evidence that the state has, will think long and hard before falsely testifying, realizing she could be tried for perjury and would not have standing to object to the illegally seized evidence in most instances. Justice Stevens also indicated that the dissent places its emphasis on the faulty recollection or intentional misstatement by defense witnesses, assuming that police officers are one hundred percent reliable and never have faulty recollection.[8] Although not mentioned in the Supreme Court opinion, the faulty recollections could be those of police and prosecution witnesses seeking an iron clad identification. But there is a difference between impeaching a defendant who faces a number of years in prison and an ordinary witness. A majority believes that the threat of prosecuting an ordinary witness is more likely to deter that witness without impacting on the exclusionary rule.

Disagreeing with Justice Brennan that the threat of perjury prosecution will be effective, Justice Kennedy, dissenting,[9] mentioned a heightened proof requirement in many states that makes it difficult to obtain perjury convictions. Likewise, crowded dockets prevent such trials "[w]here testimony presented on behalf of a friend or family member is involved, the threat that a future jury will convict the witness may be an idle one."[10] Justice Kennedy also rejected the argument that defense witnesses are not within the control of the defendant. "It should not be too hard to assure the witness does not volunteer testimony in contradiction of the facts."[11] Where such impeachment is permissible, the defense will take care not to illicit testimony that can be contradicted, and, in cases of truly neutral witnesses or hostile witnesses, it is hard to see the danger that they will present false testimony for the benefit of the defense.[12] In any event, the contradiction would only be limited to what is brought out on direct examination.[13]

The second reason advanced by the majority for not permitting impeachment by the voluntary statement obtained after an illegal arrest is that to permit this evidence to impeach defense witnesses would "chill some defendants from presenting their best defense."[14] In many instances, defendants do not have control over who they are calling, e.g., reluctant or hostile witnesses.[15] In those circumstances, the defense would have to decide whether the risk of impeachment of a defense witness is such that they would not want to call the witness at all.[16] If this type of impeachment was allowed, it would permit the state to use the evidence to dissuade the witnesses from testifying. Justice Brennan did not address the power of the prosecution to point out the contradictory evidence during pretrial interviews with the witnesses and the impact that this might have. The majority was also concerned with equal treatment towards both sides. It cited the holding that prosecutors are absolutely immune from damages for knowingly presenting perjured witnesses.[17] To allow them to be prosecuted may result in the "prosecutors withholding questionable but valuable testimony from the court."[18]

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[5] *Id.*

[6] White, Marshall, Blackmun and Stevens, JJ., joined.

[7] 46 Crim. L. Rptr. at 2054.

[8] Five members of the group, who had a friend murdered and attempted murder on the other, made an in court identification of the defendant and each testified that he had "reddish" hair worn shoulder length in a slick back "butter" style. None of these witnesses when giving a description of the three individuals who accosted them on the day of the alleged crimes, indicated that one of the individuals had reddish hair, worn in a slick back butter style. Illinois v. James, 123 Ill. 2d 523, 528 N.E.2d 723 (1988).

[9] Rehnquist, C.J., and O'Connor and Scalia, JJ., joined.

[10] 46 Crim. L. Rptr. at 2056.

[11] *Id.*

[12] *Id.*

[13] *Id.* Justice Kennedy recognized that the majority decision would "carry greater weight where contradicting testimony is elicited from a defense witness on cross-examination." He further indicated that it is not difficult to define the proper scope of rebuttal as this is a familiar task. *Id.* at n.1. But in our opinion the task is much more difficult because rebuttal may be aimed at not only what is brought out on direct examination, but the reasonable inferences from direct examination. The latter causes many difficulties.

[14] *Id.* at 2053.

[15] *Id.*

[16] *Id.*

[17] *Id.* at 2053 n.5.

[18] *Id.*

Justice Kennedy, writing for the dissenters, indicated that because the use of illegally obtained evidence is limited to impeaching what is brought out on direct examination, it only places the burden on the defense to limit the evidence to what is true.[19] He comments that witnesses who are hostile or reluctant to testify are not as likely to distort for the defense. Therefore, the problem is not as great as the majority would make it out to be.[20]

Another reason for not permitting the impeachment of the defense witness in this case is to diminish the incentive for illegal action by government officials. The dissenters indicated that this rationale is purely speculative.[21] In fact, it is not speculative where the police or the prosecutors advising the police have a close call concerning a search or seizure. There is more of an incentive to indicate, "Don't worry, if it is illegally obtained, at least we can use it for impeachment purposes." The answer to this might be that constitutional rules are very complicated. This is partially true, but it is relatively easy for advisors to police departments to satisfy constitutional rules, even in close cases, so that the results will be admissible in evidence.

To say that the impeachment will be limited to what is brought out on direct examination assumes that the rules as to the proper scope of cross-examination are clear and that there are no difficult questions as to what reasonable inferences may be drawn from the direct testimony.[22] But the rule could limit impeachment to untrue statements purposely presented and would not permit the introduction for impeachment purposes of any statement of the accused that might be characterized as a confession.

It is significant to note that the evidence excluded was not physical evidence, but a statement from the defendant. This distinction is important because of the language of Justice O'Connor in the *Connecticut v. Barrett* case.[23] Justice Kennedy states that the rule also applies to physical evidence.[24] This may be an overstatement to accentuate what he believes is an erroneous ruling.

Justice Kennedy indicates that this case will harm the truth-finding process. "It is natural for jurors to be skeptical of self-serving testimony by the defendant."[25] Thus, allowing someone other than the defendant to testify, in effect, allows perjury by proxy. To allow impeachment by the defendant's statement would not deter the defendant from putting on evidence if not all illegally seized evidence subject to suppression may be used, but only that which is rebuttal to a direct conflict in the defense testimony.

Military Rule of Evidence 311(b)(1), which reflects the prior holding of the Supreme Court, permits the introduction of evidence that was obtained as a result of an unlawful search or seizure to contradict the in court testimony of the accused. Even if Rule 311(b)(1) permitted the impeachment of a defense witness, *James* would preclude it. Thus, the question addressed in *James* applies in the military because it sets forth certain minimum standards. Other questions remain unanswered in the military communities because they are not covered by the Military Rules of Evidence: Does *James* apply to the use of physical evidence to impeach a defense witness? Does *James* apply to impeachment of co-defendant?

In *Dowling v. United States*,[26] a 6-3 opinion, the Court held that neither the double jeopardy clause nor the due process clause prohibits admitting evidence of an attempted robbery by the defendant, even though the defendant had been previously acquitted. The accused was charged with robbing a bank. One of the key issues in the case was the identity of the robber who wore a ski mask and carried a gun. An eyewitness, who had slipped out of the bank during the robbery, saw the maskless man and identified him as the defendant. Other witnesses testified that they had seen the defendant driving a hijacked taxi outside of the town shortly after the bank robbery.

Over the defendant's objection, the government called Vena Henry. She testified that a man wearing a knitted mask with cutout eyes and carrying a small handgun had, together with Delroy Christian, entered her home in the town of the robbery approximately two weeks after the charged bank robbery. Ms. Henry testified that a struggle ensued and that she unmasked the intruder, whom she identified as the defendant. Based on this incident, Dowling was charged with burglary, attempted robbery, assault, and weapons offenses. At his first trial, Dowling was acquitted. At trial for the bank robbery, the government introduced Henry's identification of the defendant, noting that the defendant wore a mask and had a gun similar to the mask and gun carried by the robber at the bank. The government purposefully sought to link Dowling with Delroy Christian, the other man who entered Henry's home. The day before the bank robbery, Dowling had borrowed a car similar to one seen in front of the bank, with

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[19] *Id.* at 2055-56.

[20] *Id.* at 2056.

[21] *Id.* at 2056.

[22] *Id.* at 2056 n.1.

[23] New York v. Quarles, 467 U.S. 649, 660 (1984) (O'Connor, J., concurring and dissenting in part).

[24] 46 Crim. L. Rptr. at 2056 n.2.

[25] *Id.* at 2055.

[26] 46 Crim. L. Rptr. (BNA) 2057 (U.S. Jan 10, 1990).

the door open, on the day of the robbery. Christian was in the back seat. The government's theory was that Christian and his friend were to drive the getaway car after the defendant robbed the bank.

Before opening statements, the prosecution disclosed it's intention to call Ms. Henry. The judge ruled that this testimony was admissible because it was highly probative circumstantial evidence. The trial judge instructed the jury that the defendant had been acquitted of robbery and emphasized the limited purpose for which the testimony was being offered. The same instruction was given to the court at the end of the trial.

The Third Circuit Court of Appeals ruled that the evidence should not be admitted, but affirmed the defendant's conviction.[27] Alternatively, the court indicated that the evidence was inadmissible under Rule 404(b) because "when the prior act sought to be introduced was the subject of an acquittal by jury, a second jury should not be permitted to conclude 'that the act occurred and that the defendant was the actor.'"[28] The court also relied on Rule 403 and indicated that the danger of undue prejudice outweighed the probative value.[29] Nevertheless, the court then found the admission to be a harmless error.[30]

Limiting *Ashe v. Swenson*[31] to its facts, the Court rejected a collateral estoppel argument that this amounted to a second trial of the same incident when the ultimate fact of identification had been determined by a valid and final judgment of acquittal at the first trial. The Court stated that to admit the evidence under Federal Rule of Evidence 404(b), the government does not have to show that the defendant was the one who had entered Henry's home beyond a reasonable doubt.[32] It need only show that the "jury can reasonably conclude that the act occurred and that the defendant was the actor."[33] "Our decision is consistent with other cases where we have held that an acquittal in a criminal case does not preclude the government from relitigating an issue when it is presented in a subsequent action covered by a lower standard approved."[34] The Court placed the burden on the defendant to demonstrate that his prior acquittal represented a jury determination that he was not one of the men who entered Ms. Henry's home.[35]

The only clue to the issues in the earlier case was a discussion between the prosecutor, defense counsel, and trial judge. The prosecutor contended that the defendant had not disputed the identity at the first trial, but rather had claimed that a robbery had not taken place because he and Christian had allegedly "merely came to retrieve ... money from an individual's house."[36] The Court then noted that the defendant relied upon a general defense. The Court never defined a general defense, but it is probably a lack of proof by the government. "As a result, even if we were to apply the Double Jeopardy Clause to this case, we would conclude that petitioner has failed to satisfy his burden of demonstrating that the first jury concluded that he was not one of the intruders in Ms. Henry's home."[37]

The Court also stated that, based on the limiting instruction, it could not be said there was a violation of the due process clause. It rejected the defendant's argument that the evidence relating to the acquittal is "inherently unreliable."[38] The defendant had an opportunity to refute the evidence. The Court also rejected the argument that introduction of the evidence under Federal Rule of Evidence 404(b) "creates a constitutionally unacceptable risk that the jury will convict the defendant on the basis of inferences drawn from the acquitted conduct."[39] To protect the defendant the trial judge has the authority to exclude potentially prejudicial evidence. While recognizing the desirability of consistency of jury verdicts, the Court did not find any inconsistency in this case.[40] Lastly, the argument that the government may not force an acquitted person to defend against the same accusation is "amply protected by the Double Jeopardy Clause."[41] In *United States v. Cuellar*[42] the court anticipated some of the issues addressed in *Dowling*. Like the Supreme Court, they indicated that neither collateral estoppel nor double jeopardy would prohibit the use of an acquittal from

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[27] Government of Virgin Islands v. Dowling, 814 F.2d 134 (3d Cir. 1987).

[28] *Id.* at 122.

[29] *Id.*

[30] *Id.* at 122-23.

[31] 397 U.S. 436 (1970).

[32] 46 Crim. L. Rptr. at 2059.

[33] *Id.*

[34] *Id.*

[35] *Id.* at 2060.

[36] *Id.*

[37] *Id.*

[38] *Id.*

[39] *Id.*

[40] *Id.*

[41] *Id.*

[42] 27 M.J. 50 (C.M.A. 1989).

another jurisdiction under Rule 404(b).[43] They went on to indicate that it was not an abuse of discretion to allow the defense to introduce evidence of acquittal as was done in *Dowling*.[44]

In *Holland v. Illinois*[45] the Supreme Court ruled that the sixth amendment[46] does not preclude a prosecutor from using peremptory challenges to remove all blacks from a white defendant's petit jury. At his trial and before the Supreme Court, defendant urged that he had been denied his sixth amendment right to be tried by a representative cross-section of the community. Although finding that the defendant had standing to assert the sixth amendment claim, the 5-4 majority declined to apply the representative cross-section requirement to selecting the actual composition of a petit jury.

The Court explained that the sixth amendment assures a defendant that the venire or jury pool is representative of the community and not "stacked" by the state. The majority severed the stages of jury selection and limited the sixth amendment representative cross-section requirement to formation of the jury pool or venire.

> That traditional understanding [of how an "impartial jury" is assembled] includes a representative venire, so that the jury will be, as we have said, "drawn *from* a fair cross section of the community." But it has never included the notion that, in the process of drawing the jury, that initial representativeness cannot be diminished by allowing both the accused and the State to eliminate persons thought to be inclined against their interests—which is precisely how the traditional peremptory challenge system operates.[47]

The majority reasoned that this impartial venire places the parties on equal footing in selecting the petit jury constitution and ensures the ultimate goal of an impartial jury. But the majority made it clear that the representative cross section requirement does not apply to the jury as empaneled.

The lead opinion of Justice Scalia did not address whether the fourteenth amendment's equal protection clause forbid racially motivated peremptories.[48] Even so, five of the Justices (Kennedy, Marshall, Brennan, Blackmun, and Stevens) revealed that they believe the equal protection clause forbids racially motivated peremptory challenges, even if the defendant is not a member of the challenged racial group. Counsel must realize that this distinct majority of the Court condemns racially motivated peremptory challenges in a context well beyond that discussed in *Batson v. Kentucky*.[49]

Nothing in the criteria of article 25[50] permits race to be a factor when the convening authority selects members of a court. Thus, both the sixth amendment's call for impartiality in the "jury pool" and the criteria of article 25 condemn racially motivated selection of potential court-martial members. In addition, trial counsel may not thereafter challenge members peremptorily for racial reasons. Such use of peremptory challenges violates the equal protection clause.[51] More significantly, however, racially motivated challenges undermine the convening authority's selection of the best qualified members pursuant to article 25(d)(2).

When the prosecution seeks to use a peremptory challenge based on something other than ethnic background, race, or sex, the reasons must be stated on the record, be objectively verifiable, and have a factual basis related to the case at bar. When a prosecution challenge for cause is a close question and the challenge is denied by the judge, a peremptory challenge against the same member should be upheld even though that member is from a particular ethnic background, race, or sex. The advice to prosecutors is clear. Do not use the peremptory challenge, even to gain an advantage in the "numbers game," unless there exists a verifiable, neutral, non-racial, case-related basis for the challenge. The prosecution must ensure fairness and avoid gamesmanship.

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[43] *Id.*

[44] *Id.*

[45] 46 Crim. L. Rptr. 2067 (U.S. Jan. 22, 1990).

[46] The Sixth Amendment provides, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, ..." (emphasis supplied).

[47] 46 Crim. L. Rptr. at 2068 (citations omitted).

[48] *Id.* at 2070 ("only the Sixth Amendment claim, and not the equal protection claim is at issue").

[49] Batson v. Kentucky, 476 U.S. 79 (1986), condemning the prosecution's use of racially motivated challenges against jurors of the same cognizable racial group as the defendant.

[50] Article 25(d)(2), Uniform Code of Military Justice, reads, "When convening a court-martial, the convening authority shall detail as members thereof such members of the armed forces as, in his opinion, are best qualified for the duty by reason of age, education, training, experience, length of service, and judicial temperament." 10 U.S.C. 825(d)(2) (1982).

[51] *See* United States v. Moore, 28 M.J. 366 (C.M.A. 1989); United States v. Santiago-Davila, 26 M.J. 380 (C.M.A. 1988).

Article 31, UCMJ, Warnings

Recent incidents indicate that counsel may be misinterpreting the statutory requirements of article 31, Uniform Code of Military Justice (UCMJ), or wrongly limiting the circumstances in which article 31's warning requirement applies. In fact, it appears that counsel actively seek to create situations in which it is arguable that the warning requirements do not apply. These erroneous interpretations and the orchestration of circumstances to avoid the statutory rights of soldiers ill serve the perception of fairness in the military justice system. Legal advisors should not skirt the requirements of law and create inadmissible evidence at the expense of a soldier's rights.

Proper rights advice is neither complex nor burdensome. A "suspect" subject to the UCMJ *must be warned* prior to "interrogation" by another person subject to the UCMJ. This congressional mandate contains no exceptions and, with the exception of unofficial acts and public safety, courts have provided limited authority for omitting the warning requirement. The warning may not be avoided by directly or indirectly having someone not subject to the UCMJ conduct the questioning—the warning requirement applies to agents. *See* Military Rule of Evidence 305(b)(1). The warning may not be eliminated by electing when to step in and out of an official role or by characterizing official conduct as "friendly." On the contrary, omitting warnings may not only violate article 98, UCMJ (noncompliance with procedural rules), but the omission may also create a *de facto* immunity in violation of Rule for Courts-Martial 704. *See Cooke v. Orser*, 12 M.J. 335 (C.M.A. 1982).

When all evidence can be legally obtained, legal advisors should advise investigators to avoid gray areas that may lead to inadmissible evidence and the reversal of a conviction. Properly rendered rights warnings have not been shown to reduce the number of confessions. In addition, when the determination is made to forego prosecution, proper immunity should be granted pursuant to R.C.M. 704. The best rule to follow has been and continues to be: When in doubt, warn.

Guard and Reserve Affairs Item

Judge Advocate Guard & Reserve Affairs Department, TJAGSA

New PMO at ARPERCEN

LTC James G. Kuklok has been assigned as the new Chief, JAG Branch, Special Officer's Division, Officer Personnel Directorate, at the Army Reserve Personnel Center in St. Louis. LTC Kuklok reported for duty as the JAG PMO on 2 April 1990. His prior duty assignment was with the Office of the Sixth Army Staff Judge Advocate. The phone number for the JA PMO office is toll free 1-800-325-4916, or commercial (314) 263-7665/7698.

CLE News

1. Resident Course Quotas

Attendance at resident CLE courses at The Judge Advocate General's School is restricted to those who have been allocated quotas. **If you have not received a welcome letter or packet, you do not have a quota.** Quota allocations are obtained from local training offices which receive them from the MACOMs. Reservists obtain quotas through their unit or ARPERCEN, ATTN: DARP-OPS-JA, 9700 Page Boulevard, St. Louis, MO 63132-5200 if they are nonunit reservists. Army National Guard personnel request quotas through their units. The Judge Advocate General's School deals directly with MACOMs and other major agency training offices. To verify a quota, you must contact the Nonresident Instruction Branch, The Judge Advocate General's School, Army, Charlottesville, Virginia 22903-1781 (Telephone: AUTOVON 274-7110, extension 972-6307; commercial phone: (804) 972-6307).

2. TJAGSA CLE Course Schedule

1990

May 14-18: 37th Federal Labor Relations Course (5F-F22).

May 21-25: 30th Fiscal Law Course (5F-F12).

May 21-June 8: 33d Military Judge Course (5F-F33).

June 4-8: 103d Senior Officer Legal Orientation Course (5F-F1).

June 11-15: 20th Staff Judge Advocate Course (5F-F52).

June 11-13: 6th SJA Spouses' Course.

June 18-29: JATT Team Training.

June 18-29: JAOAC (Phase IV).

June 20-22: General Counsel's Workshop.

June 26-29: U.S. Army Claims Service Training Seminar.

July 9-11: 1st Legal Administrator's Course (7A-550A1).

July 10-13: 21st Methods of Instruction Course (5F-F70).

July 12-13: 1st Senior/Master CWO Technical Certification Course (7A-550A2).

July 16-18: Professional Recruiting Training Seminar.

July 16-20: 2d STARC Law and Mobilization Workshop.

July 16-27: 122d Contract Attorneys Course (5F-F10).

July 23-September 26: 122d Basic Course (5-27-C20).

July 30-May 17, 1991: 39th Graduate Course (5-27-C22).

August 6-10: 45th Law of War Workshop (5F-F42).

August 13-17: 14th Criminal Law New Developments Course (5F-F35).

August 20-24: 1st Senior Legal NCO Management Course (512-71D/E/40/50).

September 10-14: 8th Contract Claims, Litigation & Remedies Course (5F-F13).

September 17-19: Chief Legal NCO Workshop.

3. Civilian Sponsored CLE Courses

July 1990

1-6: NJC, Advanced Evidence, Reno, NV.

1-6: NITA, Advanced Trial Advocacy Program, Boulder, CO.

1-6: NJC, Court Administration for Trial Judges and Administrators, Reno, NV.

1-6: NJC, Intermediate Personal Computers, Reno, NV.

2-6: ALIABA, Advanced Law of Pensions and Deferred Compensation, Boston, MA.

8: NJC, General Jurisdiction, Reno, NV.

8-13: NJC, Current Issues in Civil Litigation, Reno, NV.

8-20: NITA, National Session in Trial Advocacy, Boulder, CO.

8-20: NJC, The Decision Making Process, Reno, NV.

9-13: ALIABA, Basic Law of Pensions and Deferred Compensation, Palo Alto, CA.

9-13: ALIABA, International Trade for the Nonspecialist, Palo Alto, CA.

13-14: UKCL, Annual Estate Planning Seminar, Lexington, KY.

15-20: NJC, Special Problems in Criminal Evidence, Reno, NV.

16-20: ALIABA, The Bankruptcy Code Reexamined and Updated, Malibu, CA.

19-20: PLI, Acquiring or Selling the Privately Held Company, Chicago, IL.

22-27: NJC, Constitutional Criminal Procedure, Reno, NV.

22-27: NJC, Law, Ethics and Justice, Reno, NV.

26-27: NELI, Employment Discrimination Law Update, San Francisco, CA.

29-August 3: NJC, Judicial Writing, Reno, NV.

For further information on civilian courses, please contact the institution offering the course. The addresses are listed in the February 1990 issue of *The Army Lawyer*.

4. Mandatory Continuing Legal Education Jurisdictions and Reporting Dates

Jurisdiction	Reporting Month
Alabama	31 January annually
Arkansas	30 June annually
Colorado	31 January annually
Delaware	On or before 31 July annually every other year
Florida	Assigned monthly deadlines every three years
Georgia	31 January annually
Idaho	1 March every third anniversary of admission
Indiana	1 October annually
Iowa	1 March annually
Kansas	1 July annually
Kentucky	30 days following completion of course
Louisiana	31 January annually
Minnesota	30 June every third year
Mississippi	31 December annually
Missouri	30 June annually
Montana	1 April annually
Nevada	15 January annually
New Mexico	For members admitted prior to 1 January 1990 the initial reporting year shall be the year ending September 30, 1990. Every such member shall receive credit for carryover credit for 1988 and for approved programs attended in the period 1 January 1989 through 30 September 1990. For members admitted on or after 1 January 1990, the initial reporting year shall be the first full reporting year following the date of admission.
North Carolina	12 hours annually
North Dakota	1 February in three-year intervals
Ohio	24 hours every two years
Oklahoma	On or before 15 February annually
Oregon	Beginning 1 January 1988 in three-year intervals
South Carolina	10 January annually
Tennessee	31 January annually
Texas	Birth month annually
Utah	31 December of 2d year of admission
Vermont	1 June every other year
Virginia	30 June annually
Washington	31 January annually
West Virginia	30 June annually

Wisconsin	31 December in even or odd years depending on admission
Wyoming	1 March annually

For address and detailed information, see the January 1990 issue of *The Army Lawyer*.

5. Army Sponsored Continuing Legal Education Calendar (1 April 1990 — 1 October 1990)

The following is a schedule of Army Sponsored Continuing Legal Education that is not conducted at TJAGSA. Those interested in the training should check with the sponsoring agency for quotas and attendance requirements. NOT ALL training listed is open to all JAG officers. Dates and locations are subject to change; check before making plans to attend. Sponsoring agencies are: OTJAG Legal Assistance, (202) 697-3170; TJAGSA On-Site, Guard & Reserve Affairs Department, (804) 972-6380; Trial Judiciary, (703) 756-1795; Trial Counsel Assistance Program (TCAP), (202) 756-1804; U.S. Army Trial Defense Service (TDS), (202) 756-1390; U.S. Army Claims Service, (301) 677-7622; Office of the Judge Advocate, U.S. Army Europe & Seventh Army (POC: MAJ Duncan, Heidelberg Military 8459). This schedule will be updated in *The Army Lawyer* on a periodic basis. Coordinator: CPT Cuculic, TJAGSA, (804) 972-6342.

TRAINING	LOCATION	DATES
USAREUR TDS CLE	Bad Kissingen, FRG	1-4 Apr 90
TCAP Seminar	San Diego, CA	3-4 Apr 90
1st Region TDS	Ft Belvoir, VA	4-6 Apr 90
TJAGSA On-Site	Chicago, IL	7-8 Apr 90
3rd Region TDS	Ft Leavenworth, KS	18-20 Apr 90
TCAP Seminars	USAREUR	30 Apr-11 May 90
TJAGSA On-Site	Columbus, OH	5-6 May 90
TJAGSA On-Site	Jackson, MS	5-6 May 90
2d Region TDS	Ft Benning, GA	8-11 May 90
USAREUR Int'l Law Trial Observer CLE	Heidelberg, FRG	10-11 May 90
USAREUR SJA CLE	Heidelberg, FRG	17-18 May 90
USAREUR Op Law CLE	Heidelberg, FRG	22-25 May 90
TCAP Seminar	Ft Hood, TX	21-22 Jun 90
U.S. Army Claims Training Workshop	Charlottesville, VA	26-29 Jun 90
TCAP Seminar	Norfolk, VA	12-13 Jul 90
TCAP Seminar	Ft Bragg, NC	2-3 Aug 90
USAREUR Branch Office	Heidelberg, FRG	10 Aug 90
USAREUR Contract Law: Procurement Fraud Advisor CLE	Heidelberg, FRG	17 Aug 90
USAREUR SJA CLE	Heidelberg, FRG	23-24 Aug 90
5th Judicial Circuit Conference	Garmisch, FRG	Sep 90
USAREUR Legal Assistance CLE	Heidelberg, FRG	4-7 Sep 90
TCAP Seminar	Colorado Springs, CO	17-18 Sep 90

Current Material of Interest

1. TJAGSA Materials Available Through Defense Technical Information Center

Each year, TJAGSA publishes deskbooks and materials to support resident instruction. Much of this material is useful to judge advocates and government civilian attorneys who are not able to attend courses in their practice areas. The School receives many requests each year for these materials. Because such distribution is not within the School's mission, TJAGSA does not have the resources to provide these publications.

In order to provide another avenue of availability, some of this material is being made available through the Defense Technical Information Center (DTIC). There are two ways an office may obtain this material. The first is to get it through a user library on the installation. Most technical and school libraries are DTIC "users." If they are "school" libraries, they may be free users. The second way is for the office or organization to become a government user. Government agency users pay five dollars per hard copy for reports of 1-100 pages and seven cents for each additional page over 100, or ninety-five cents per fiche copy. Overseas users may obtain one copy of a report at no charge. The necessary information and forms to become registered as a user may be requested from: Defense Technical Information Center, Cameron Station, Alexandria, VA 22314-6145, telephone (202) 274-7633, AUTOVON 284-7633.

Once registered, an office or other organization may open a deposit account with the National Technical Information Service to facilitate ordering materials. Informa-

tion concerning this procedure will be provided when a request for user status is submitted.

Users are provided biweekly and cumulative indices. These indices are classified as a single confidential document and mailed only to those DTIC users whose organizations have a facility clearance. This will not affect the ability of organizations to become DTIC users, nor will it affect the ordering of TJAGSA publications through DTIC. All TJAGSA publications are unclassified and the relevant ordering information, such as DTIC numbers and titles, will be published in *The Army Lawyer*. The following TJAGSA publications are available through DTIC. The nine character identifier beginning with the letters AD are numbers assigned by DTIC and must be used when ordering publications.

Contract Law

AD B136337	Contract Law, Government Contract Law Deskbook Vol 1/JAGS-ADK-89-1 (356 pgs).
AD B136338	Contract Law, Government Contract Law Deskbook, Vol 2/JAGS-ADK-89-2 (294 pgs).
AD B136200	Fiscal Law Deskbook/JAGS-ADK-89-3 (278 pgs).
AD B100211	Contract Law Seminar Problems/JAGS-ADK-86-1 (65 pgs).

Legal Assistance

AD A174511	Administrative and Civil Law, All States Guide to Garnishment Laws & Procedures/JAGS-ADA-86-10 (253 pgs).
AD B135492	Legal Assistance Guide Consumer Law /JAGS-ADA-89-3 (609 pgs).
AD B116101	Legal Assistance Wills Guide/JAGS-ADA-87-12 (339 pgs).
AD B136218	Legal Assistance Guide Administration Guide/JAGS-ADA-89-1 (195 pgs).
AD B135453	Legal Assistance Guide Real Property /JAGS-ADA-89-2 (253 pgs).
AD A174549	All States Marriage & Divorce Guide/ JAGS-ADA-84-3 (208 pgs).
AD B089092	All States Guide to State Notarial Laws/ JAGS-ADA-85-2 (56 pgs).
AD B114052	All States Law Summary, Vol I/JAGS-ADA-87-5 (467 pgs).
AD B114053	All States Law Summary, Vol II/JAGS-ADA-87-6 (417 pgs).
AD B114054	All States Law Summary, Vol III/JAGS-ADA-87-7 (450 pgs).
AD B090988	Legal Assistance Deskbook, Vol I/JAGS-ADA-85-3 (760 pgs).
AD B090989	Legal Assistance Deskbook, Vol II/ JAGS-ADA-85-4 (590 pgs).
AD B092128	USAREUR Legal Assistance Handbook/ JAGS-ADA-85-5 (315 pgs).
AD B095857	Proactive Law Materials/JAGS-ADA-85-9 (226 pgs).
AD B116103	Legal Assistance Preventive Law Series/ JAGS-ADA-87-10 (205 pgs).
AD B116099	Legal Assistance Tax Information Series/JAGS-ADA-87-9 (121 pgs).
AD B124120	Model Tax Assistance Program/JAGS-ADA-88-2 (65 pgs).
AD-B124194	1988 Legal Assistance Update/JAGS-ADA-88-1

Claims

AD B108054	Claims Programmed Text/JAGS-ADA-87-2 (119 pgs).

Administrative and Civil Law

AD B087842	Environmental Law/JAGS-ADA-84-5 (176 pgs).
AD B087849	AR 15-6 Investigations: Programmed Instruction/JAGS-ADA-86-4 (40 pgs).
AD B087848	Military Aid to Law Enforcement/ JAGS-ADA-84-7 (76 pgs).
*AD B139524	Government Information Practices/ JAGS-ADA-89-6 (416 pgs).
AD B100251	Law of Military Installations/JAGS-ADA-86-1 (298 pgs).
*AD B139522	Defensive Federal Litigation/JAGS-ADA-89-7 (862 pgs).
AD B107990	Reports of Survey and Line of Duty Determination/JAGS-ADA-87-3 (110 pgs).
AD B100675	Practical Exercises in Administrative and Civil Law and Management/ JAGS-ADA-86-9 (146 pgs).
AD A199644	The Staff Judge Advocate Officer Manager's Handbook/ACIL-ST-290.

Labor Law

*AD B139523	Law of Federal Employment/JAGS-ADA-89-4 (450 pgs).
*AD B139525	Law of Federal Labor-Management Relations/JAGS-ADA-89-5 (452 pgs).

Developments, Doctrine & Literature

AD B124193	Military Citation/JAGS-DD-88-1 (37 pgs.)

Criminal Law

AD B135506	Criminal Law Deskbook Crimes & Defenses/JAGS-ADC-89-1 (205 pgs).

AD B100212	Reserve Component Criminal Law PEs/ JAGS-ADC-86-1 (88 pgs).
AD B135459	Senior Officers Legal Orientation/ JAGS-ADC-89-2 (225 pgs).
*AD B140529	Criminal Law, Nonjudicial Punishment/ JAGS-ADC-89-4 (43 pgs).
*AD B140543	Trial Counsel & Defense Counsel Handbook/JAGS-ADC-90-6 (469 pgs).

Reserve Affairs

AD B136361	Reserve Component JAGC Personnel Policies Handbook/JAGS-GRA-89-1 (188 pgs).

The following CID publication is also available through DTIC:

AD A145966	USACIDC Pam 195-8, Criminal Investigations, Violation of the USC in Economic Crime Investigations (250 pgs).

Those ordering publications are reminded that they are for government use only.

*Indicates new publication or revised edition.

2. Regulations & Pamphlets

Listed below are new publications and changes to existing publications.

Number	Title	Date
AR 10-89	U.S. Army Civilian Personnel Evaluation Agency	15 Dec 89
AR 11-34	The Army Respiratory Protection Program	15 Feb 90
AR 20-1	Inspector General Activities and Procedures	15 Dec 89
AR 25-55	The Department of the Army Freedom of Information Act Program (This Reg. S/S AR 340-17, 1 Oct 82)	10 Jan 90
AR 27-10	Military Justice	22 Dec 89
AR 37-47	Contingency Funds of the Secretary of the Army	15 Jan 90
AR 70-25	Use of Volunteers as Subjects of Research	25 Jan 90
AR 600-8-101	Personnel Processing (In- and Out-and Mobilization Processing)	12 Dec 89
AR 608-10	Child Development Services	12 Feb 90
AR 608-18	Personal Affairs The Army Family Advocacy Program, Interim Change 102	18 Dec 89
AR 672-8	Manufacture, Sale, Wear and Quality Control of Heraldic Items	25 Oct 89
PAM 27-162	Claims	15 Dec 89
CIR 11-89-3	Army Management Control Plan	31 Dec 89
PAM 570-5	The Army Functional Dictionary-Manpower	4 Dec 89
UPDATE 19	Message Address Directory	31 Dec 89

By Order of the Secretary of the Army:

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